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# Vol. I

## TRANSCRIPT OF RECORD

85796

# Supreme Court of the United States

OCTOBER TERM, 1937

## No. 84

ALABAMA POWER COMPANY, PETITIONER,

*vs.*

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

## No. 85

ALABAMA POWER COMPANY, PETITIONER,

*vs.*

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

## No. 86

IOWA CITY LIGHT AND POWER COMPANY, PETITIONER,

*vs.*

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 26, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

VOL. 3

# TRANSCRIPT OF RECORD

## United States Court of Appeals for the District of Columbia

APRIL TERM, 1938

## No. 6579

TEXAS UTILITIES, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. D. MAL[illegible], ACTING EXECUTIVE OFFICER THEREOF, ET AL,

## No. 6580

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN [illegible], EXECUTIVE ASSISTANT THEREOF, ET AL.

## No. 6581

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF, ET AL.

PRINTED AUGUST 30, 1938.

# United States Court of Appeals for the District of Columbia

**APRIL TERM, 1936.**

## No. 6579

TEXAS UTILITIES, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, APPELLANT,

*vs.*

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; ET AL.

## No. 6580

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

*vs.*

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; ET AL.

## No. 6583

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

*vs.*

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; ET AL.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

---

INDEX.


| | Original | Print |
|---|---|---|
| Transcript of record, No. 6579, filed Oct. 24, 1935 | 1 | 1 |
| Motion to remand No. 6579 | 37 | 37 |


PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX CONTINUED.


| | Original | Print |
|---|---|---|
| Transcript of record, No. 6580, filed Oct. 24, 1935 | 64 | 39 |
| Motion to remand No. 6580 | 102 | 77 |
| Transcript of record, No. 6583, filed Oct. 24, 1935 | 237 | 159 |
| Motion to remand No. 6583 | 271 | 193 |
| Order remanding No. 6579 | 304 | 194 |
| Order remanding No. 6580 | 305 | 195 |
| Per curiam memorandum in support of order remanding cause &c. No. 6580 | 306 | 196 |
| Order remanding No. 6583 | 308 | 198 |
| Transcript of record, Nos. 6579, 6580, and 6583 filed Aug. 18, 1936 | 309 | 199 |
| Designation for printing and binding of records | 646 | 503 |
| Proceedings in United States Court of Appeals for District of Columbia | | 507 |
| Minute entry of hearing | | 507 |
| Opinion, Van Orsdel, J. | | 508 |
| Concurring opinion, Groner, J. | | 515 |
| Judgment, Case No. 6580 | | 516 |
| Judgment, Case No. 6583 | | 516 |
| Judgment, Case No. 6865 | | 517 |
| Order on motion for stay of mandate | | 518 |
| Designation of record | | 519 |
| Clerk's certificate | | 520 |
| Orders allowing certiorari | | 522 |



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1937.

—9176-C

# United States Court of Appeals for the District of Columbia

## OCTOBER TERM, 1935

## No. 6579

TEXAS UTILITIES COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, APPELLANT,

*vs.*

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DISBURSEMENTS DIVISION OF THE TREASURY OF THE UNITED STATES, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX


| | Original | Print |
|---|---|---|
| Caption | a | 1 |
| Memoranda: Bill of complaint filed, amended bill of complaint filed | 1 | 2 |
| Motion to dismiss the bill of complaint as amended | 2 | 2 |
| Motion of defendants Henry Morgenthau, Jr., et al. to dismiss amended bill of complaint | 4 | 4 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1935.

—7018-C

| | Original | Print |
|---|---|---|
| Memoranda: Order for preliminary injunction filed, injunction undertaking for $5,000.00 approved and filed | 5 | 5 |
| Second amended bill of complaint for an injunction and other relief; fiat of Adkins, J. | 6 | 5 |
| Order dismissing bill of complaint | 38 | 32 |
| Appeal noted by plaintiff, bond for costs on appeal fixed, &c. | 39 | 32 |
| Order continuing injunction | 40 | 33 |
| Memorandum: $50 deposit in lieu of bond on appeal | 41 | 34 |
| Assignment of errors | 42 | 34 |
| Designation of record | 43 | 35 |
| Clerk's certificate | 45 | 36 |

# United States Court of Appeals for the District of Columbia

No. 6579.

TEXAS UTILITIES COMPANY, etc., Appellant,

vs.

HAROLD L. ICKES, Administrator, et als.

*a* Supreme Court of the District of Columbia.

In Equity.

No. 58927.

TEXAS UTILITIES COMPANY, a Corporation Organized and Existing under the Laws of the State of Texas, Plaintiff,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; J. J. Madigan, Acting Executive Officer thereof, et als., Defendants.

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity No. 58927.

TEXAS UTILITIES COMPANY, a Corporation Organized and Existing under the Laws of the State of Texas, Plaintiff,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; J. J. Madigan, Acting Executive officer thereof; F. E. Schnepfe, Director of Projects Division thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Disbursements Division of the Treasury of the United States, Defendants.

*Memoranda.*

June 24, 1935—Bill of Complaint filed.
July 1, 1935—Amended Bill of Complaint filed.

2 *Motion to Dismiss the Bill of Complaint as Amended of the Defendants, Harold L. Ickes, as Federal Emergency Administrator of Public Works; Horatio B. Hackett, as Assistant Administrator; J. J. Madigan, as Acting Executive Officer, and F. E. Schnepfe, as Director of the Projects Division of Said Adminstration.*

Filed July 5, 1935.

* * * * * * *

Come now the said defendants, by their attorney below named, and move the Court to dismiss the bill of complaint as amended, and as grounds for said motion say:

1. The bill of complaint does not state any matter in equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

2. The bill of complaint seeks an injunction to restrain the defendants from entering into any arrangement or

agreement with the City of Plainview, Texas, for the purpose of constructing or financing the construction of an electric plant and system in said city. The said City of Plainview is an indispensable party to such a suit and is not joined

3. The said suit does not present a justiciable con-
3 troversy of which the courts of the United States or of the District of Columbia have jurisdiction.

4. The plaintiff does not allege the necessary injury or interest which entitle it to bring this action or obtain the relief prayed for.

5. The bill of complaint does not show that the acts threatened by the defendants will injure any right of the plaintiff.

6. The plaintiff's capacity as a federal taxpayer is insufficient to enable it to challenge the constitutionality of the Act referred to in the bill of complaint, viz., Title II, Secs. 20°, 203 of the National Industrial Recovery Act, or the acts of the Administrator thereunder.

7. The plaintiff's capacity as a taxpayer of said City of Plainview and of the State of Texas and other subdivisions thereof is insufficient to enable it to challenge the constitutionality of said Act, or the acts of the Administrator thereunder.

8. The power of the Congress to appropriate money is not confined to the enumerated powers expressed in Article I of the Constitution.

9. No constitutional rights of the plaintiff are impaired or destroyed by the acts alleged to be threatened by the defendants.

10. The acts alleged to be threatened by the defendants are authorized by law.

11. The bill of complaint does not in other respects apparent on the face of the bill state a cause of action cognizable in equity.

HENRY T. HUNT,

*Special Assistant to the Attorney General, as Attorney for Defendants Ickes, Hackett, Madigan and Schnepfe.*

Service of copy acknowledged July 5, 1935.

HOWARD C. WESTWOOD,

*Atty. for Plff.*

4 *Motion of Defendants Henry Morgenthau, Jr., William A. Julian and Guy Allen to Dismiss the Amended Bill of Complaint for an Injunction and Other Relief.*

Filed July 8, 1935.

* * * * * * *

Come now the defendants, Henry Morgenthau, Jr., William A. Julian, and Guy Allen, by their attorneys below named, and move the Court to dismiss the amended bill of complaint for an injunction and other relief, and as grounds for said motion say:

1. That the amended bill of complaint does not state any matter in equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

2. That the City of Plainview, Texas, is an indispensable party to said suit and is not named as a party.

3. That said suit does not present a justiciable controversy over which the courts have jurisdiction.

4. That the plaintiff does not allege the necessary injury or interest which entitles it to bring this action or obtain the relief prayed for.

5. That the bill of complaint does not show that the acts threatened by these defendants will injure any right of the plaintiff.

6. That the plaintiff's capacity as a federal taxpayer is insufficient to enable it to challenge the constitutionality of the act referred to in the bill of complaint.

5 7. That the power of Congress to appropriate money is not confined to the enumerated powers expressed in Article I of the Constitution.

8. That no constitutional rights of the plaintiff are impaired or destroyed by the acts alleged to be threatened by these defendants.

9. That the acts alleged to be threatened by these defendants are authorized by law.

10. That the statutes referred to in the bill of complaint against which plaintiff complains are not unconstitutional.

11. That the amended bill of complaint fails to allege any facts showing any legal injury to the plaintiff, threatened

or otherwise, as the basis for which it may maintain this suit.

12. That the facts alleged in the amended bill of complaint show that this is a suit against the United States, and the United States has not consented to be sued.

13. That the bill of complaint does not in other respects state a cause of action cognizable in equity.

14. And for other reasons apparent of record.

LESLIE C. GARNETT,
*United States Attorney,*
DAVID A. PINE,
*Assistant United States Attorney,*
*Attorneys for Defendants,*
*Morgenthau, Julian and Allen.*

Received copy of the above motion to dismiss, this 8th day of July, 1935.

EDWARD G. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
FONTAIN C. BRADLEY,
*Attorneys for Plaintiff.*

*Memoranda.*

August 28, 1935.—Order for Preliminary Injunction filed. Injunction undertaking for $5,000.00 approved and filed.

6 Leave to file granted. Jesse C. Adkins. Oct. 14, 1935.

*Second Amended Bill of Complaint for an Injunction and Other Relief.*

Filed October 14, 1935.

* * * * * * *

Now comes the plaintiff, and by leave of Court files this its second amended bill of complaint, and for its causes of action against the defendants alleges:

Paragraph I.

Plaintiff is a corporation organized and existing under the laws of the State of Texas, is a resident and citizen of

the State of Texas, and has its principal office and corporate domicile in the City of Plainview, Hale County, Texas, and sues in its own right.

Paragraph II.

The defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found
7 within said District of Columbia, are more than twenty-one years of age, and are more particularly identified as herein specifically set forth:

Harold L. Ickes is the duly appointed, qualified and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United States of America dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the National Industrial Recovery Act;

Horatio B. Hackett is the duly appointed, qualified and acting Assistant Administrator of PWA;

J. J. Madigan is the duly appointed, qualified Acting Executive Officer of PWA;

F. E. Schnepfe is the duly appointed, qualified and Acting Director of Projects Division of PWA;

Henry Morgenthau, Jr., is the duly appointed, qualified and acting Secretary of the Treasury of the United States, and as such has general supervision and control over the disbursement of the public funds of the United States;

W. A. Julian is the duly appointed, qualified and acting Treasurer of the United States, and as such is, under the supervision of the said Secretary of the Treasury, in control of the disbursement of the public funds of the United States; and

Guy Allen is the duly appointed, qualified and acting Chief Disbursing Officer of the Treasury Department, and as such is at the head of the Division of Disbursement of the Treasury Department, and is in control of the actual drawing and issuing of checks on behalf of the United States, and the actual disbursements of the public funds of the United States.

Each of the foregoing officers or employees is sued on account of acts which he threatens to perform under the

pretended authority of Title II of the National Industrial Recovery Act as extended by section 12 of the Emergency Relief Appropriation Act of 1935 and paragraph (a) of the President's Executive Order of June 7, 1935.

Paragraph III.

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

Paragraph IV.

On or about the 15th day of April, 1909, the City Council of the City of Plainview, Texas, passed its Ordinance No. 23, a copy of which is hereto attached, marked Exhibit A, granting to Charles A. Malone and R. C. Malone and their associates, successors and assigns a franchise to construct, operate and maintain an electric light and power plant and distribution system in the City of Plainview, Texas, and to use the streets, alleys and public highways of said city for the purpose of such plant and system. Said franchise was granted for the period of fifty years. On or about the 17th day of November, 1915, Charles A. Malone and R. C. Malone assigned said franchise to this plaintiff. The said franchise has never been cancelled or forfeited and has at all times been and is now in full force and effect. In reliance upon said franchise the plaintiff built a large power plant and distribution system in said city, and has been and is now operating in said city under said franchise, and has been and is now engaged in the business of distributing and selling electricity to the inhabitants of said city and to the City itself.

Said business of plaintiff in said city is a part of a large electric utility business conducted by plaintiff throughout a larger region in that part of Texas wherein said city is located. Neither in Plainview nor in said larger region is plaintiff engaged in interstate commerce or in any business in any way affecting interstate commerce. It produces and sells its electricity entirely within the State of Texas,
9 and is not in any way affecting any persons engaged in or whose business in any way affects interstate commerce.

Plaintiff's Texas system is adequately designed and conducted to fit the peculiar needs of the countryside wherein

communities are scattered and spaces vast. Its equipment is modern and in excellent condition throughout, and its plants, particularly with respect to Plainview, are of the best condition and design, for service of this sort, which engineering skill has devised. Its system has spread and grown in the van of the needs of said portion of the State of Texas, and is so coordinated as to anticipate future needs and growth; it represents careful social planning and understanding of the communities. In this system the Plainview unit is one of the most important parts and its continued operation as at present is indispensable to adequate service at the present low rates for many surrounding communities, in the drive to develop which the Plainview unit has been a spearhead. The entire system represents intensive application of the economies of large-scale, integrated power development, and if the Plainview unit were to be driven to cease or substantially to curtail operations by the actions of PWA as hereinafter set forth, the result would be to destroy integration.

The total value of plaintiff's investment in Texas is approximately Ten Million Dollars ($10,000,000.00) and, while plaintiff cannot precisely allege the value properly allocated to its Plainview service, its business and investment so allocated would be at least Eight Hundred Thousand Dollars ($800,000.00) of value. This represents a plant and distribution system and general office building within Plainview, and the allocated value of a transmission system connecting the Plainview system with a central power plant near Abernathy, Texas. The value of the plaintiff's unexpired Plainview franchise alone is in excess of Twenty-Five Thousand Dollars ($25,000.00), and the gross revenue from plaintiff's operations within Plainview for the year 1934 were approximately One Hundred Fifty Thousand Dollars ($150,000.00).

Plaintiff has been and now is the only agency existing in Plainview for the distribution and sale therein of electricity. Its system was designed to be, and is, adequate to supply and distribute all the electricity at the present time required within Plainview by users thereof, and has excess facilities and capacity sufficient to supply and distribute to new users, or for additional uses, all further amounts of electricity which it may be reasonably anticipated will in the future be required by users within Plainview. The elec-

tric service furnished by plaintiff has been and will continue to be adequate, reasonable and satisfactory, and has been and will continue to be furnished at rates which are fair and reasonable, at levels which are among the lowest in the state charged by utilities, whether publicly or privately owned, for service of the character furnished by plaintiff. Pursuant to statutes of the State of Texas, and to its City Charter, Plainview has for some years regulated all rates for the service furnished by plaintiff to the inhabitants of Plainview and to the City of Plainview itself, and in all other necessary respects has regulated said service furnished by plaintiff. The service furnished by plaintiff within Plainview will continue to be adequate, reasonable and satisfactory hereafter, not only because of plaintiff's disposition so to furnish service, but because of said regulatory power lodged in the City of Plainview.

Out of a total population of eighty-eight hundred people within Plainview, plaintiff has through the years, at the risk of the private investment of funds by the holders of its various securities, built up a business which now serves twenty-two hundred customers, aside from its service to the City of Plainview itself.

11 Paragraph V.

Plaintiff is and for many years has been a taxpayer of the United States, and has paid many thousands of dollars in income and excise taxes to the United States, and is subject to the obligation of paying hereafter many thousands of dollars in such taxes, and is a purchaser and consumer of commodities subject to taxes payable to the United States. For the year 1934 the plaintiff paid or incurred liability to pay taxes to the United States, applicable to its electrical properties, operation and sales in Texas, in the sum of more than Twenty-Six Thousand Seven Hundred Fifty Dollars ($26,750.00).

Paragraph VI.

Plaintiff is and for many years has been a taxpayer of the City of Plainview, of Hale County, and of the various taxing districts located wholly or in part in Hale County, and of the State of Texas, and has paid thousands of dollars in taxes to said City, County and subdivisions, and

State, and plaintiff is subject to the obligation of paying many thousands of dollars in such taxes in the future. With respect to its electrical properties, operation and sales in Texas, plaintiff has paid, or incurred liability to pay, taxes for the year 1934 to said City in excess of the sum of Three Thousand Dollars ($3,000.00), to said County and subdivisions in excess of the sum of Nine Thousand Five Hundred Dollars ($9,500.00), and to said State in excess of the sum of Eighteen Thousand Dollars ($18,000.00).

Paragraph VII.

The PWA, under the direction of defendant Ickes, has conceived, and for some time past has been executing throughout the country a plan to fix the rates of privately owned electricity utilities at levels determined by PWA to be "socially desirable" and to promote public ownership of electricity utilities, regardless of local state policy, as a "yardstick" of electricity rates and service to
12 which privately owned electricity utilities must conform. This plan is not intended to have and, in fact, does not have any relation to interstate commerce; its intended and actual effect is control and regulation of entirely local and intrastate commerce.

The plan is effectuated by soliciting and inducing municipalities and other political subdivisions of the several states to permit PWA to institute and to carry out, as Federal Public Works Projects, the construction of electricity generating and distributing systems within such subdivisions, such systems being planned, built and financed by and under the control and direction of PWA, and being operated by PWA through its retention of absolute control over the rates to be charged for the service of such systems when completed.

Upon tentative selection of an area for such a Project, PWA usually informs existing private electricity utilities in such area that to escape being superseded by or suffering competition from such a system such private utilities must establish rates satisfactory to PWA and, in effect, consent to continuing PWA regulation of their rates under the threat of destruction. The rates so exacted are arbitrarily set by PWA, do not provide a reasonable return to such utilities upon their investment, are much less than those fixed by authorized state regulatory bodies, and are

determined without hearing such utilities and without any consideration whatever of the elements required by the due process clauses of the Fifth and Fourteenth Amendments to be considered in rate regulation. Plaintiff cannot aver with particularity the level to which such privately owned utilities are required to conform because PWA has never adopted definite criteria but acts in each case according to an arbitrary and vaguely formulated conception of "social desirability". In general, however, such level is that at which a system built and operated by PWA as aforesaid would earn enough to pay operating costs without
13 provision for Federal, state, or local taxes, and to repay over a long period of time so much of the cost of construction thereof as is represented by the pretended loan made by PWA as hereinafter described; and in many instances PWA requires a level even lower.

If the existing private utilities in such area conform to the standard so fixed by PWA, PWA usually suspends consummation of such a Federal Public Works Project for a time sufficient to enable it to be assured that such conformity is in good faith and permanent and then, if satisfied, PWA usually abandons the project. Otherwise PWA proceeds to consummate the Project, as heretofore and hereafter described, and either subjects the private utilities to rate-war to attain the rate level desired by PWA and if possible to drive such utilities out of business, or induces the state regulatory bodies to revoke the privileges of such utilities to do business.

This plan is frankly acknowledged by PWA in public press releases, in public statements of the Administrator, in instructions given to PWA agents charged with the administration of PWA functions, in negotiations with existing private utilities, and otherwise.

In deciding thus to build electricity generating and distributing systems, the sole consideration entertained by PWA is the rate level of existing privately owned utilities. The extent of unemployment in the vicinities, or elsewhere, and the relation between the employment given by such a Project and the character of workers unemployed, the dependability and economic soundness of existing private utilities, the capacity of the areas to absorb increased electricity production, and other considerations relating to the need for such a PWA electricity system are excluded en-

tirely by PWA in reaching its decision to build and operate such a Project.

To induce the necessary cooperation of municipalities and other political subdivisions in the various states
14 and to procure their consent to such Federal Public Works Projects and to the regulation of the rates of existing privately owned utilities by PWA in accordance with the aforesaid plan, PWA, by advertising and other newspaper publilicity and by circulars and direct statements ma[illegible] to municipalities by authorized agents, has represented that it would authorize and direct the construction, as Federal Public Works Projects, of electricity generating and distributing systems, to become the property of such municipalities. The representations have been that approximately thirty per cent of the cost of the Project would be an outright gift, the balance of the cost to be repaid to PWA, if at all, out of the revenue of the system; and that thus no risk would be incurred by the municipality. When the municipality consents to such a Project and PWA decides to threaten existing utilities with its consummation, a so-called loan and grant arrangement is entered into similar to the so-called agreements between PWA and the City of Plainview, hereinafter described. Such an arrangement constitutes a pretense and sham in that it does not in fact provide for a loan but merely for the possible recapture of a part of the cost of such projects out of the earnings thereof, and imposes no obligations upon said municipalities and confers no authority upon them in the construction thereof, all as more specifically hereinafter set forth.

All the acts of the defendants hereinafter complained of are done or threatened in pursuance of the plan hereinbefore alleged.

Paragraph VIII.

During the year 1933 PWA and the defendant Ickes, in pursuance of the plan hereinabove alleged, began negotiations which have continued to this day with said City of Plainview looking to the construction in said City as a Federal Public Works Project authorized and directed
15 by PWA and financed by funds of the United States Government, of an individual, diesel engine-oper-

ated, municipal electricity generating and distribution plant, wherewith to furnish said City and its inhabitants with electric service, the same in character, and intended to serve the same parties as that now and heretofore furnished by plaintiff within Plainview, and as would hereafter otherwise be furnished by plaintiff. All such negotiations have been conducted out of the presence of plaintiff and its representatives, and all papers recording such negotiations have been withheld from plaintiff at the direction of PWA, defendant Ickes, his agents and employees. Plaintiff has repeatedly requested of PWA, of defendant Ickes, and of the City of Plainview, access to such papers, and particularly to those portions which have become public documents, but such requests have been refused. There is no other source, so far as plaintiff is able to learn after diligent search and inquiry, from which the content of such negotiations and papers can be learned.

However, on or about March 1, 1935, plaintiff's attorneys and representatives called upon Mr. Otto M. Rau, then Chairman of PWA Power Board of Review, to confer with said Rau concerning such negotiations between PWA and the City of Plainview. In the course of said conference said Rau informed the plaintiff's representatives that the only matter considered relevant by PWA in deciding whether to authorize the project proposed in Plainview was the matter of plaintiff's rates, that all other considerations were immaterial, that PWA's policy was to authorize and proceed with such projects if rates charged by existing private utilities were higher than PWA thought proper and to refuse to do so if such existing rates were deemed proper by PWA. Said Rau then stated that plaintiff's rates were "too high". After further discussion said Rau formally proposed and offered on the part of PWA that if plaintiff would reduce and adjust its rates in a specified manner PWA would disapprove the said project
16 because said rates would be thoroughly satisfactory to PWA and because the City plant could not hope effectually to compete with such rates. Plaintiff promptly accepted such offer and on or about March 4, 1935, delivered to said Rau written notification that such rate reduction and adjustment would be instituted on April 1, 1935. Said reduction and adjustment, in the manner specified by said Rau, were made at that time in reliance upon such

offer by PWA, and said reduced rates continue to be and will in the future be in full force and effect for all plaintiff's service in Plainview.

The aforesaid offer on the part of PWA by said Rau was made pursuant to a procedure regularly established by PWA in the administration of its public works campaign, whereby said Rau was authorized thus to bargain with existing electricity utilities in localities wherein competing projects were contemplated by PWA, and to bind PWA to abandon such projects if the existing utilities would reduce their rates to a level found by said Rau to be that deemed by PWA to be "socially desirable". This procedure as above outlined was designed to carry out the plan of regulating the intrastate electricity rates of the utilities of the country as hereinabove in Paragraph VII alleged.

Despite the binding commitment of PWA, through said Rau, to abandon said Plainview project, and pursuant to the aforesaid plan of regulating and controlling intrastate rates, here applied to secure rates still lower than those sought by PWA in other cases, defendant Ickes, on or about April 18, 1935, notified the City of Plainview, and announced in the public press, that Four Hundred Twenty-Three Thousand Three Hundred Forty-Six Dollars and Four Cents ($423,346.04) of Federal funds had been allocated and would be employed to construct and finance a municipal electricity plant and distribution system in Plainview, to compete with plaintiff as aforesaid. Plaintiff is informed and believes, and so alleges, that of such sum

17 an amount equal to 30 per cent of the cost of labor and materials employed in the construction of such plant and system will constitute an outright gift from the Federal Government to the City of Plainview, and that the balance thereof will be repaid, if at all, only out of the earnings of such project.

Plaintiff is informed and believes and so alleges that PWA and defendant Ickes, with the connivance of and in conspiracy with the City of Plainview, have made said allotment and will proceed with the construction and operation of said plant solely for the purpose of driving down the rates of the plaintiff and so injuring plaintiff's business; that there is no difference between the plaintiff and other privately owned electricity companies justifying the effort which will be made to force plaintiff to reduce its

rates below the level now in effect pursuant to the proposal of said Rau, which effort is not made in other localities against other privately owned utilities in plaintiff's position when such other utilities acquiesce and agree to the rate proposed by said Rau or by a PWA representative performing the functions which were performed by said Rau in this instance. This effort of PWA, and the arrangement with the City of Plainview hereinafter set forth, are pursuant to and in furtherance of the plan heretofore described to control the electricity rates of privately owned utilities throughout the country, and are here directed to secure rates, as will appear from said arrangement, twenty-five per cent lower than those which are, in other cases, sought and enforced by PWA.

While the procedure pursued by PWA, defendant Ickes and his agents, in making such allotment, does not provide for a hearing from those whose property and rights will be injured or destroyed through the financing and construction of such a municipal plant and system, plaintiff has repeatedly requested and sought a hearing before the various organs of PWA, but has constantly been denied the privilege of such hearing. Nevertheless, plaintiff has prepared and filed with PWA a protest in writing
18 against said allotment and against such financing and construction of such plant and system, which protest sets forth in substance and elaborates upon the facts heretofore and hereafter alleged in this bill, but plaintiff is informed, believes and alleges that said protest has been treated as immaterial and has not been considered by PWA. There is no other board, agency or official of the United States to whom plaintiff may apply to prevent the consummation of such proposed financing and construction. Consequently plaintiff has exhausted all administrative remedies which it could possibly have from such threatened action.

Paragraph IX.

Plaintiff is informed, believes and so alleges that the City of Plainview, induced and persuaded by the offer of PWA to give it outright a grant of thirty percent of the cost of construction of an electricity generating and distributing system and by the PWA campaign, described in Paragraph VII hereof, to construct such municipal systems,

has acquiesced in and accepted the PWA proposal to institute a Federal Public Works Project in said City and will conform in all respects to the will of PWA with respect thereto and to its purpose to drive down plaintiff's rates and injure plaintiff's business. Accordingly, the PWA and the defendants will, unless restrained immediately, make available the funds allotted for, and will construct the project, as aforesaid, under the following arrangement:

The defendant Ickes and the City of Plainview will enter into a pretended "loan and grant agreement," if indeed they have not already done so, which will, in effect, provide that the defendant Ickes and his agents shall construct said electricity plant and distribution system in said City and finance said construction by giving outright to said City 30 per cent of the cost of labor and materials employed in the construction of such plant and system, and by the pretense of lending to said City, by pretended purchase of its bonds, to be used for such financing and construction, the difference between the amount of such grant and the sum of Four Hundred Twenty-Three Thousand Three Hundred Forty-Six Dollars and Four Cents ($423,346.04).

19 The said City of Plainview will (or has) agreed in return that said funds will be made available to it upon requisition only in such amounts as defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of defendant Ickes is needed to complete the project; that the said funds shall be deposited by the City in such banks as defendant Ickes chooses; that such proceeds shall be expended by the City only as defendant Ickes consents; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be according to the will of defendant Ickes; that all work on the project shall be done under the regulation of defendant Ickes; that no contractor or subcontractor shall bid for or work upon such project without the approval of defendant Ickes; that all contractors and sub-contractors shall be equipped with bonds and insurance as defendant Ickes desires; that said City shall engage in such litigation as defendant Ickes deems advisable with respect to irregularities, or defects, or illegalities in the bonds; that defendant Ickes may cancel the arrangement with the City at any time he wishes and withhold further funds from the City, if in his opinion said

City has unreasonably delayed in carrying out any of its duties; that the aforesaid funds shall be available to the City only subject to the power of defendant Ickes to withhold them if he deems the City's budgetary situation to be unsatisfactory, or if he is not satisfied that the City has complied with all provisions of the agreement; and that in other respects the will of defendant Ickes shall control the City's action, even to the extent of the naming of the project, and that such project shall in fact be named "Federal Public Works Project No. —." It is further a part of said arrangement that the defendant Ickes, or his agents, will be permitted to fix, and from time to time to change, minimum rates of pay and maximum hours for all persons employed on such construction, to enforce employment preferences in favor of ex-service men and others, to designate agencies through which workmen may be employed, to direct the use of human labor in place of machinery, to require disclosure to PWA of all information which PWA may desire with respect to such construction work, to require that all the disputes between the City of Plainview and the contractors or subcontractors, and all labor disputes arising in connection with the construction, shall be submitted to the Board of Labor Review or other agency of PWA for final determination, and in every way to direct and control the construction of such plant and distribution system. It is a part of said arrangement that the City shall undertake to obtain any other funds deemed by defendant Ickes necessary to complete such plant and system, in the manner and from sources prescribed by defendant Ickes; to operate the plant and system upon completion and furnish electricity to consumers now being served by plaintiff; never to charge rates at a level more than twenty-five per cent less than the rates now being charged in Plainview by plaintiff; to pay from the general funds of the City, at current selling rate schedules, for energy used by the City itself; to grant to PWA and its assigns a fifteen year franchise to use and occupy public thoroughfares and grounds of said City for furnishing electric service and for the operation and maintenance of such plant and system in the event the City is unable to repay the pretended loan out of the earnings of the project with the rates thereof fixed by the defendant Ickes as afore-

said; and in other ways to submit to the will and regulation of defendant Ickes with respect to the operation of such plant and system. The said pretended bonds to be issued by the City, through the purchase of which the pretended loans from PWA are to be made, are not general obligations of the City, but it is expressly understood and agreed between said City and PWA that said bonds shall not constitute an indebtedness of said City within the meaning of any provision or limitation of the laws of Texas and shall never impose a pecuniary liability upon said City or charge against its general credit. Said pretended bonds are payable solely from the revenue to be derived from said Project after provision for the cost of operation and maintenance.

Paragraph X.

Plaintiff is informed and believes, and so alleges, that the proposed municipal plant and system will be equipped to serve approximately sixty-five per cent of the present demand for electricity within the City of Plainview, and that, on the basis of past experience in cases of competing municipal and private facilities, the proposed plant and system will actually serve about half of the present demand of consumers within the City. Said municipal plant, because of existing contracts with plaintiff, will be prevented from furnishing the electricity for the city street lighting system and for the pumping of the City water supply. In any event the potential demand of the City and its inhabitants is insufficient to support two electricity utilities. Plaintiff is informed and believes, and so alleges, that the proposed plant and system are not intended to and could not serve outside said City.

The rates at which it is proposed that the service of the contemplated municipal plant and system shall be rendered will not sustain it. Even were it to charge the rates now being charged by plaintiff and even if by the end of two years it were to acquire as much as sixty per cent of the business of consumers within said City, it would still be unable to pay from plant revenues the operating costs, the principal and interest on the pretended loan from PWA, and the necessary sums to preserve and replace its property as it wears out. On the contrary, said revenues will fail by between One Hundred and Fifty Thousand Dollars

($150,000.00) and Two Hundred Thousand Dollars ($200,-
000.00) to pay such charges during the first twenty
22 years of the life of the municipal system. Plaintiff
so alleges on the assumption that the operating expenses of the municipal system will be as low as the plaintiff's are and have been; but this will not in fact be true, for the large economies and the low unit-overhead expense, incident to the plaintiff's extensive integrated system, will not be available to a small independent generating and distribu'ing system. Said municipal plant and system will not be self-liquidating.

Paragraph XI.

The threatened action of the defendants herein, pursuant to said plan of defendants and the arrangement with the City of Plainview, as aforesaid, is null and void, and without warrant in law, and the defendants are wholly without authority to perform any of the acts which said arrangement contemplates to be performed by them, and which are threatened to be performed by them, as herein alleged, because:

(1) Section 202 of the National Industrial Recovery Act as extended provides that the Administrator shall prepare a comprehensive program of public works. Section 203 provides that the Administrator may construct, finance, or aid in the construction or financing of any public works project "included in the program prepared pursuant to Section 202." PWA has announced that allotments will be made before such a comprehensive program is prepared. In line with this policy, allotments have been made in the absence of the preparation of such program, no such program has ever been prepared, the allotment herein and the action of the defendants in financing and constructing the proposed plant and system are being performed in the absence of the preparation of such a program, and the City of Plainview project herein alleged has never been included in any such program. The only "program" ever prepared is the sum of the particular projects which PWA has determined to carry out; this is not the preparation
23 of a program under Section 202, but is a mere catalogue of action taken.

(2) The proposed pretended loan to the City of Plainview is in violation of the requirement of Section 203 of the

National Industrial Recovery Act as extended that such a loan by the United States be reasonably secured. Said loan is not, and cannot be, reasonably secured. As alleged heretofore, the pretended bonds, through the pretended purchase of which the alleged loan is to be made, are to be paid only from and secured only by the earnings of the proposed electricity plant and distribution system, which will be wholly insufficient and inadequate to pay the operating expense of said plant and the interest and sinking fund upon said pretended bonds, and are not general obligations of said City.

Moreover, said bonds are null and void because based upon undertakings of the City which violate the law of the State of Texas, and any payment for them by defendants is unauthorized by the National Industrial Recovery Act as extended:

(a) The City has surrendered to PWA and defendant Ickes all power and discretion with respect to plans and specifications for such plant and system, the acceptance and rejection of bids, the content and form of construction and other contracts, etc., contrary to Section 17, Article I and Articles II and III, of the Constitution of the State of Texas; contrary to Texas Revised Civil Statutes, 1925, Title 28, and contrary to Texas Revised Civil Statutes, 1925, Article 2368-a.

(b) The City has surrendered all power and discretion to PWA and defendant Ickes with respect to the deposit, disposition and disbursement of the funds for the construction of such plant and system, with respect to the character of material, labor and contractors to be employed, with respect to the manner and form of such construction, and so will be prevented from obtaining bids which will enable
24 the City absolutely to determine who are the lowest responsible bidders, and from accepting such bids, contrary to those provisions of the Constitution of the State of Texas and of its statutes set forth in subparagraph (a) above, and the Texas Revised Civil Statutes, 1925, Articles 2559-2566.

(c) The City has surrendered to PWA and defendant Ickes the power to change and increase the cost of such construction work during the course of construction after the letting and even the part performance of contracts, contrary to those parts of the Constitution of the State of

Texas and of its statutes set forth in subparagraph (a) above, and particularly in violation of Section 53, Article III, of said Constitution.

(d) The City has surrendered to PWA and the Board of Labor Review the power to determine and finally to settle all issues and controversies arising between the City and any contractor, with respect to changed economic conditions during the performance of any contract, and to determine and finally to settle all labor controversies, contrary to those parts of the Constitution of the State of Texas and its statutes set forth in subparagraph (a) above, and particularly in violation of Section 53 of Article III of said Constitution.

(e) The City has surrendered its discretion to make charges against the revenue derived from the operation of such plant and system, to provide for depreciation, retirements and replacements of depreciable parts thereof, and to preserve the integrity and operating efficiency of such plant and system, contrary to those parts of the Constitution of the State of Texas and of its statutes set forth in subparagraph (a) above and particularly in violation of Texas Revised Civil Statutes, 1925, Article 1113.

(f) The City has surrendered to PWA and defendant Ickes the power to fix rates for electric energy and service furnished by such plant and system, contrary to those parts of the Constitution of the State of Texas and of its statutes set forth in subparagraph (a) above, and particularly in violation of Texas Revised Civil Statutes, 1925, Article 1113.

(g) In other ways the City has surrendered to these defendants its non-delegable powers, in violation of the laws of Texas; and further its agents will, by the contemplated operation of the project, violate Article 1638 of the Texas Penal Code.

(3) The project herein complained of is not authorized by Section 203 of the National Industrial Recovery Act as extended because said project is not reasonably designed or capable of increasing employment quickly. Plaintiff is informed and believes, and so alleges, that of such unemployment as exists in the City of Plainview or vicinity there is virtually none among persons who can be employed on a project of this sort. The project will require almost altogether skilled workmen, of whom there are only about

ten available unemployed. The project in fact has no reasonable relation to the unemployment situation in the city or vicinity. Moreover, such project will inevitably cause permanent unemployment of many, and perhaps eventually all, of those now in plaintiff's employ.

(4) Said project is not authorized by Section 202 of the National Industrial Recovery Act as extended, because said section, by particularly enumerating, in the list of Public Works for which public moneys might be lent and granted, "development of water power" and "transmission of electrical energy," has excluded a project such as the proposed Plainview diesel engine-operated generating plant. No other provision of said section authorizes a municipal generating and distributing plant of this sort. Furthermore the authority to make a grant, such as that contemplated, expired on June 18, 1935, by virtue of Section 201 (d) of said Act, which authority is not extended by the aforesaid Emergency Relief Appropriation Act of 1935. Nor does such Act of 1935 authorize a project of this type;
26 and even if it did, such a project must at least be self-liquidating. This project will not, as heretofore alleged, be self-liquidating. Furthermore the purported loan herein is in no sense a loan, but is itself, in whole or in greater part, a grant and gift; for it can never be repaid, due to the incapacity of the project to earn its way and due to the invalidity of the City's obligation as hereinbefore alleged.

(5) Said project is not authorized by Title II of the National Industrial Recovery Act as extended because it is wholly useless and wasteful, in that it duplicates plaintiff's existing, adequate, reasonable and satisfactory system, and because it is uneconomic and foolish in that an independent generating and distribution system cannot be maintained save at rates far above those now charged, if at all, due to the small number of possible customers. The project can result only in disastrous rate wars, destructive of both plaintiff's facilities and the project itself. The small demand in said City can, as heretofore alleged, support only one utility. The additional project will be not only useless but predatory; its effect will be to decrease, instead of to promote, the fullest possible utilization of the present productive capacity of the electrical industry, and particularly that portion of the industry carried on by plaintiff.

(6) Said project is not authorized by Title II of the National Industrial Recovery Act as extended because the undertakings exacted from the City by PWA and defendant Ickes and the proposed construction and operation of the electricity plant and system will violate the law of the State of Texas. Such undertakings constitute an unlawful delegation to foreign agents, these defendants, of the obligations of said City under the law of Texas as alleged, in subparagraph (2) hereof, and otherwise. Furthermore, the law of the State of Texas is violated in that the grant and loan by PWA is, for reasons heretofore and hereafter set out, invalid, and therefore the City will be obligated
27 immediately to refund to PWA the amount of the grant and loan so illegally made and accepted by it, and the City will thereby become indebted to PWA, in violation of statutory provisions of the State of Texas with respect to the manner and amounts of indebtedness which may be legally incurred by the City.

(7) Said project herein complained of is without warrant in said National Industrial Recovery Act as extended or in any law of or in the Constitution of the United States, but the action of the defendants in furthering said project is in violation of the Tenth Amendment to the Constitution of the United States, because:

(a) Said project is undertaken by the defendants solely for the express purpose of and pursuant to a publicly announced policy of controlling and lowering electricity rates within each State of the United States, as heretofore alleged in Paragraphs VII and VIII. Specifically, the project threatened, as herein alleged, is designed solely to afford consumers within the City of Plainview with electricity rates at levels deemed by defendant Ickes and PWA to be "socially desirable." Such action will in no manner affect interstate commerce; its effect is confined altogether to the inhabitants of said city, wholly within the State of Texas.

(b) Said project is undertaken by the defendants solely for the purpose of furthering a policy of public ownership of electricity systems within each State of the United States, and specifically is designed merely to afford said City of Plainview an opportunity to erect a municipally owned electricity system to serve as a "yardstick" for the demonstration of conceptions of "social planning" and rate regulation entertained by PWA and defendant Ickes and will in

no manner affect interstate commerce; its effect is confined altogether to the inhabitants of the said city, wholly within the State of Texas.

(c) Said project is to be constructed and operated
28 under the absolute direction and control of the defendants, even to its most minute details, in matters having no relation to interstate commerce, and in a manner constituting usurpation of the local authority of the said City and assumption of control over its own affairs.

(8) Said project herein complained of is without warrant in said National Industrial Recovery Act as extended or in any law of or in the Constitution of the United States, but the action of the defendants in furthering said project is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, because said defendants are arbitrarily and without warrant singling out this plaintiff as the subject of competition from such project under circumstances wherein others situated precisely similarly to plaintiff are and would be immunized from such competition. Whereas such others are and would be left free of such competition when they agree to institute rates at a level below which a competing public plant would not be self-liquidating, this plaintiff, despite such a reduction by it, induced by said Otto M. Rau, as alleged in Paragraph VIII hereof, is nevertheless arbitrarily threatened with a more stringent application of the aforesaid policy of PWA to control intrastate rates.

(9) In so far as said National Industrial Recovery Act as extended purports to confer upon said defendants, as officers of the United States, power to do any of the acts herein complained of, said Act and said purported power are void and without warrant in the Constitution of the United States, but are in violation thereof because:

(a) Neither Title II of said National Industrial Recovery Act nor the Emergency Relief Appropriation Act of 1935 extending said Title indicates any adequate legislative standard to guide the officers charged with the administration of said Title, but on the contrary seeks to
29 delegate legislative power to the President and to such administrative officers, in violation of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; and Article II, Section 1, of the Constitution.

(b) The funds of the United States available and to be used for the project herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such authority conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution, which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said project will not promote the general welfare of the United States, but is exclusively for the local and private welfare of the consumers of electricity in said city. Said project will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful duplication of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary or incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manufacturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purpose would be merely for the private gain and profit of such manufacturers, sellers and contractors.

(c) Neither Title II of said National Industrial Recovery Act as extended nor any administrative regulation or procedure followed by PWA or the defendants in administering said Title provides for any method whereby persons whose rights will be injured and whose property will be taken by action of the defendants may be given an opportunity for full and adequate hearing; nor has this plaintiff been afforded any such opportunity, although the defendants herein threaten to take its property by virtue of unlawful and destructive competition and the threat thereof. Such denial of a hearing constitutes a violation of the due process clause of the Fifth Amendment of the Constitution.

(10) If it be that these defendants seek and find some purported authority in the Emergency Relief Appropria-

tion Act of 1935 further than that granted in paragraph (a) of the President's Executive Order of June 7, 1935, any such further authority is baseless and void for the reasons set out in this Paragraph XI.

(11) These defendants are estopped and barred from consummating said project herein complained of because of the agreement between PWA and this plaintiff as more particularly elaborated in Paragraphs VII and VIII hereof.

Paragraph XII.

Action by these defendants carrying out said arrangement with said City will aid and abet the City of Plainview in violating the law and Constitution of the State of Texas, as herein more particularly alleged in Paragraph XI, subparagraphs (2) and (6), and will therefore be unlawful and void.

Paragraph XIII.

Plaintiff is informed and believes, and therefore alleges, that the said City of Plainview and the said defendants herein are, in accordance with the aforesaid unlawful arrangement between defendant Ickes and the City, combining and conspiring together and with each other to consummate their joint project of constructing and operating said electricity plant and distributing system and to injure the plaintiff, and will, unless restrained by this Court, immediately proceed so to do. Pursuant to such combination and conspiracy, PWA and defendant Ickes have entered into or are about to enter into the aforesaid pretended loan and grant agreement with said City and the other details
31 of said arrangement. Said City will immediately present to defendant Ickes, or one or more of the defendants, officers of PWA, or their agents, initial requisitions of money to be furnished pursuant to said agreement, and said defendants, or one of them, will, unless restrained by this Court, make such funds available for the construction of said project by withdrawing such funds from the Treasury of the United States and paying such funds out as provided in said agreement, and will immediately direct and proceed with said construction in pursuance of said unlawful plan and arrangement to construct and operate such project in cooperation with said City. Each and all of the foregoing threatened acts of said defendants will re-

sult in immediate and irreparable injury, loss and damage to plaintiff, as hereinafter more specifically alleged.

Paragraph XIV.

If the defendants, or any of them, shall carry out the provisions of the said arrangement with the City, or do any or all of the acts threatened by them as hereinbefore alleged, the property right of plaintiff to enjoy its franchise free from injurious competition brought about by unlawful means and to conduct its business and charge rates free from interference and domination by an agency of the federal government will immediately be invaded and destroyed; the value of the franchise and business of plaintiff in said city and of the tangible and intangible property acquired and used therein, and of the private funds invested and risked therein, represented by the capital stock and bonds of plaintiff, will immediately be greatly damaged and impaired, and may finally be rendered utterly worthless. It will immediately be impossible for plaintiff to obtain new customers or to increase the consumption of electricity by its present customers, but, on the contrary, plaintiff will immediately lose great numbers of its customers and must engage in a destructive rate war with the danger of being forced altogether to retire from business; furthermore, by reason of said unlawful project, it
32 will be impossible for plaintiff to sell or otherwise to dispose of its business and property save as junk and waste. The plaintiff as a taxpayer to the United State will be specially injured as in this paragraph set forth, and will have been and in the future will be subjected to a deprivation of its property by taxation for a purpose without warrant in law or in the Constitution and in violation thereof. The right of the plaintiff, as a taxpayer to said City, that its municipal corporation shall not be forced to violate the law of the State of Texas, and shall not enter into and be forced to carry out a relationship with others, specifically these defendants and PWA, who are without authority to enter into such a relationship, will be violated. By reason of all the foregoing allegations, the plaintiff, through unlawful interference with, injury to, and deprivation of its franchise, through unlawful deprivation of its property by taxation, and through unlawful deprivation and violation of its right that its municipality shall not be

forced to violate the law of Texas and shall not enter into and be forced to carry out relationships with others who are unauthorized to enter into them, will suffer loss of its property without that due process of law guaranteed it by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States, and such injury and deprivation will constitute an immediate and irreparable loss, for which it has, and can have no adequate remedy at law.

Paragraph XV.

In so far as plaintiff sues as a taxpayer of the United States, of the State of Texas, of the County of Hale, or its subdivisions, or of the City of Plainview, it sues for all those persons similarly situated.

Paragraph XVI.

The said City of Plainview and the members of its governing body are not made parties defendant hereto
33 because they are without the jurisdiction of this Court, and service of process cannot be had upon them in the District of Columbia. Plaintiff instituted suit against the City in the District Court of the United States for the Northern District of Texas, setting up the lack of authority on the part of these defendants substantially as alleged herein, and praying that the City be enjoined from entering into the arrangement with defendants herein complained of. Plaintiff notified defendant Ickes of such suit in order to give him an opportunity to make himself a party. Said Ickes did not do so, but sent a communication to the City Attorney directing the filing of a motion to dismiss on the ground that he, the said Ickes, was an indispensable party. This communication was read to the Court, such a motion was filed by the City Attorney, and the Court did, in the latter part of June of this year, dismiss plaintiff's bill, without prejudice, stating orally, in substance, that the dismissal was based on the fact that plaintiff's real quarrel was with said Ickes and that said Ickes was the indispensable party. That proceeding thereupon ended.

Paragraph XVII.

Plaintiff alleges that it is futile to ask the said City to rescind its unlawful arrangement with defendant Ickes and

PWA; plaintiff has repeatedly and constantly protested to the City the invalidity of the arrangement, substantially on the grounds herein set forth, but the City persists in its determination to consummate the said arrangement and the project.

Paragraph XVIII.

The said City of Plainview has, as hereinbefore alleged, announced its intention to join with the defendants as officers of the PWA in the immediate consummation of the said project, and plaintiff is informed and believes, and therefore alleges, that unless the defendants are immediately restrained from doing so, they will at once perform the acts alleged in Paragraph XIII herein; plaintiff
34 is further informed and believes, and therefore alleges, that the giving of notice of application for a restraining order would precipitate said unlawful acts and that said acts would do all the mischief complained of by the plaintiff herein and would result in immediate and irreparable injury, loss and damage to the plaintiff, whereas restraint of the doing thereof until disposition of plaintiff's application for a temporary injunction has been made would result in no detriment or injury to the defendants.

Wherefore, the premises considered, the plaintiff prays:

(1) That process issue against the defendants requiring them to answer this bill (but not under oath or affirmation, the benefit whereof is hereby expressly waived by the plaintiff).

(2) That this Court grant plaintiff a temporary restraining order against defendants, and each of them, enjoining each and all the defendants, their officers, agents and all persons acting in the aid of said defendants and their successors in office, from doing any act or thing to carry out any of the provisions of said unlawful arrangement with said City, and from, in any manner, aiding in the construction, or from financing the construction, of said electricity generating and distributing system in said City of Plainview; and, more specifically, from entering into any arrangement or agreement with the City of Plainview for the purpose of constructing or financing the construction of said electricity plant and system in said city, from honoring any requisition and from transferring, lending, giving or disbursing to the City of Plainview any funds whatsoever

for said purpose, and from taking any step whatever or doing any act or thing designed to aid or facilitate the financing or construction of said plant and system; such restraining order to be effective only until the matter of plaintiff's application for preliminary injunction shall be disposed of.

35 (3) That after notice and hearing, the Court enter a preliminary injunction to the same effect.

(4) And that upon final hearing, this Court enter a final order and decree to the same effect.

(5) And for such other and further relief as to the Court may seem meet.

TEXAS UTILITIES COMPANY,
By HOWARD C. WESTWOOD,
*Attorney.*

EDWARD B. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
*Solicitors for the Plaintiff.*

DISTRICT OF COLUMBIA, *ss:*

Howard C. Westwood being duly sworn, deposes and says that he is one of the attorneys for Texas Utilities Company; that Texas Utilities Company is a corporation organized under the laws of the State of Texas and that said corporation and its officers are absent from the District of Columbia; that he is informed that the statements made in this bill as of the personal knowledge of said plaintiff are within the personal knowledge of the corporation and its officers, and that the statements made therein as upon information and belief are facts of which said officers have been informed and believe, and from information obtained from said corporation and its officers he verily believes the facts stated in the bill of complaint to be true.

HOWARD C. WESTWOOD.

Subscribed and sworn to before me, this 15th day of October, 1935.

[SEAL.] MILDRED C. HENNINGER,
*Notary Public, D. C.*

My commission expires Nov. 16, 1939.

36 EXHIBIT A.

April 15th, 1909.

Ordinance No. 28.

An Ordinance Granting to Chas. A. Malone, R. C. Malone, and Their Associates the Right to Construct, Operate, and Maintain an Electric Light and Power Plant in the City of Plainview, Texas.

Be it ordained by the City Council of the City of Plainview, Texas:

Section 1. That Chas. A. Malone, R. C. Malone, their associates, successors and assigns, be and they are hereby granted the right to construct and operate and maintain over, along and across all the streets, alleys and public highways of the City of Plainview, Texas, in accordance with all reasonable ordinances of said City, now in force and hereafter to be passed by the City Council of said City, an electric light and power plant.

Section 2. The plant shall be constructed so as to not interfere with the free use of the public of all streets and alleys and public highways. Any damage done to the streets, alleys and public highways shall be properly repaired by the said Chas. A. Malone, R. C. Malone, and their associates or at their expense.

Section 3. This franchise is granted for the period of 50 years. The said Chas. A. Malone, R. C. Malone, for themselves and their associates and assigns, have consented, in consideration of said grant, that the City of Plainview may place a system of fire alarm wire and fixtures on all of their poles belonging to said Electric Light and Power Plant, the same to be attached under the supervision of said owners of said plant at such places as they think best, but at the expense of the City and the same shall be maintained by the City at its expense.

Section 4. This franchise shall lapse and be of no
37 force and effect unless construction begins within sixty (60) days *and* from the passage of this ordinance and the plant shall be in operation within six months from the time of the commencement of the construction.

Section 5. The failure of the grantees herein to comply with any one or part of any one of said above sections shall operate as a forfeiture of this franchise.

Section 6. The conditions requiring the passage of this ordinance create an emergency and imperative public necessity exists, the rule requiring the ordinance to be read on three several days be suspended and that this ordinance take effect and be in force from and after its passage and it is so enacted.

Passed and approved at a called session of the City Council of the City of Plainview, Texas, this 15th day of April 1909.

(Signed) JAS. R. DELAY,
*Mayor.*

Attest:
(Signed) J. F. BANDER,
*City Secretary.*

[SEAL.]

38 *Order Dismissing Bill of Complaint.*

Filed October 15, 1935.

* * * * * * *

This cause came on to be heard on the defendants' motion to dismiss the bill of complaint for want of equity, and the plaintiff having been granted in open court leave to file a second amended bill of complaint, and said bill having been filed and the parties having agreed that the said motion to dismiss should stand as to all the defendants against the second amended bill, and this court having heard the argument of the parties thereon, and being fully advised in the premises,

Now, therefore, on motion of the defendants, it
39 is this 14th day of October, 1935,

Adjudged, ordered and decreed that the motion of the defendants to dismiss the second amended bill of complaint be, and the same is hereby granted; and it is further

Adjudged, ordered and decreed that the second amended bill of complaint be and the same is hereby dismissed; and it is further

Adjudged, ordered and decreed that the preliminary injunction heretofore in this cause entered is dissolved.

Presented by
ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

No objection as to form.
DEAN ACHESON,
*Attorney for Plaintiff.*

JESSE C. ADKINS,
*Justice.*

From the foregoing decree the plaintiff, by its attorney, in open court, notes an appeal to the United States Court of Appeals for the District of Columbia, and the cost bond on appeal is hereby fixed at one hundred dollars or in lieu thereof a cash deposit of fifty dollars.

JESSE C. ADKINS,
*Justice.*

40 *Order Continuing Injunction.*

Filed October 15, 1935.

* * * * * * *

This cause having come on to be heard on the defendants' motion to dismiss the second amended bill of complaint herein, and the said motion having been granted and the said bill having been dismissed, and the preliminary injunction heretofore entered having been dissolved, and a decree entered, and the plaintiff having in open court noted an appeal from such decree, thereupon, in open court, the plaintiff moved the court to restore the preliminary injunction during the pendency of the appeal and the defendants having represented that said injunction should be modified;

Now, therefore, it is this 15th day of October, 1935, ordered that during the pendency of the aforesaid
41 appeal the defendants, Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; J. J. Madigan, Acting Executive Officer thereof; F. E. Schnepfe, Director of Projects Division

thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Disbursements Division of the Treasury of the United States, and each of them, their agents and all persons acting in aid of them and their successors in office, be, and they are hereby, restrained from constructing or in any manner aiding in the construction of an electricity generating and distributing system in the City of Plainview, State of Texas, or from transferring, lending, giving or disbursing to the said City any funds whatsoever of the United States for the purpose of constructing or financing the construction by the said City of an electricity generating and distributing system and from doing any act or thing for the purpose of effecting or bringing about the transfer, loan, gift or disbursement to said City of any funds whatsoever for the said purpose; provided, that nothing in this order contained shall be construed to restrain said defendants or their agents, pending this appeal, from negotiating and entering into a new contract with said municipality of Plainview, terminating any existing agreement with said municipality and from making any new offer to said municipality.

By the Court.

JESSE C. ADKINS,
*Justice.*

*Memorandum.*

October 19, 1935.—$50 deposit in lieu of bond on appeal.

42 *Assignment of Errors.*

Filed October 21, 1935.

* * * * * * *

Now comes the plaintiff, and in its capacity as the owner of an electricity business with appendant franchise rights in the City of Plainview, Texas, and as a taxpayer of the United States, as a taxpayer of the said City of Plainview, of the County of Hale and of the State of Texas, assigns as error the action of the Court in the following matters:

1. The Court erred in sustaining the motion of the defendants to dismiss the second amended bill of complaint.

2. The Court erred in dismissing the second amended bill of complaint.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
*Attorneys for Plaintiff.*

Received a copy of the foregoing assignment of errors this — day of October, 1935.

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

43 *Designation of Record.*

Filed October 21, 1935.

* * * * * * *

The Clerk will please prepare the record on appeal in the above entitled cause and include therein the following:

1. Memorandum: Bill of complaint, filed June 24, 1935.

2. Memorandum: Amended bill of complaint, filed July 1, 1935.

3. Motion of defendant Ickes and others to dismiss amended bill of complaint, filed July 5, 1935, in full, but excluding points and authorities.

4. Motion of defendants Morgenthau and others to dismiss amended bill of complaint, filed July 8, 1935, but excluding points and authorities.

5. Memorandum: Order granting preliminary injunction, August 28, 1935. Undertaking, Five Thousand Dollars ($5,000.00), approved.

6. Second amended bill of complaint, filed October 14, 1935, as amended, in full. Fiat.

44 7. Final decree entered October 14, 1935, in full, including notation of appeal and order fixing cost bond on appeal.

8. Order continuing injunction pending appeal and modifying same, October 14, 1935, in full.

9. Memorandum of deposit of Fifty Dollars ($50.00) in lieu of bond on appeal.
10. Assignment of errors.
11. This designation.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
*Attorneys for Plaintiff.*

The defendants have no additional designation.

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

45 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 44, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 58927 in Equity, wherein Texas Utilities Company, a corporation organized and existing under the laws of the State of Texas, is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of October, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
*Clerk,*
By CHAS. B. COFLIN,
*Assistant Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 6579. Texas Utilities Company, etc., Appellant, vs. Harold L. Ickes, Administrator, et al. United States Court of Appeals for the District of Columbia. Filed Oct. 24, 1935. Henry W. Hodges, Clerk.

37 Endorsed on Cover: United States Court of Appeals for the District of Columbia. Filed Dec 17 1935. Henry W Hodges Clerk.

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38 In the United States Court of Appeals for the District of Columbia

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No. 6579.

TEXAS UTILITIES COMPANY, *Appellant.*

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, ET AL., *Appellees*

---

*Motion*

Now come the appellees and respectfully show to this Court:

I

That the decree, entered herein in the Supreme Court of the District of Columbia, on October 15, 1935, and from which the present appeal was taken, dismissed the bill of complaint on the ground of insufficiency and on other similar grounds. The suit was brought to enjoin the defendants from advancing Public Works Administration funds to the City of Plainview, Texas, for the purpose of constructing an electric power plant.

For several weeks last past the City has been negotiating with the Public Works Administration, and said ne-
39 gotiations culminated on November 18, 1935, in an offer the terms of which are vitally and substantially different than is alleged in the bill of complaint. Thus the pleadings do not now represent an actually existing controversy between the parties, and it would be futile and useless to continue the litigation on the basis of them.

The facts relative to the above are as follows: On or about August 17, 1935, the Administrator and said city of

Plainview executed a loan and grant agreement, a copy of which is hereto attached, made a part hereof and marked Exhibit 1, which was in existence at the time when the bill was filed by the appellant. After the decree was entered on October 15, 1935, in this cause in the Supreme Court of the District of Columbia, and while this case was pending on appeal, on or about November 18, 1935, the Administrator and the said City of Plainview entered into an agreement terminating the former agreement and all other understandings and agreements, if any, between the parties to that agreement relating to subject matter thereof. A true copy of said terminating agreement is attached hereto, made a part hereof, and marked Exhibit 2. On December 4, 1935, there was delivered to said city by the Administrator an offer to purchase certain of the bonds of said city and to make a grant to said city of Plainview, a true copy of which offer is also attached hereto, made a part hereof, and marked Exhibit 3.

Wherefore, and for the reasons set forth in the
40 annexed memorandum, the appellees move that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts above set forth and for a trial or other disposition of the cause on such amended pleadings.

JAMES W. MORRIS,
*Assistant Attorney General.*
ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*
JOHN W. SCOTT,
*Special Assistant to the Attorney General.*
JEROME N. FRANK,
*Counsel for the Federal Emergency Administration of Public Works.*

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Exhibits 1, 2, and 3 referred to in the foregoing motion are not printed at this point because they respectively appear as Exhibits D, E, and F to the stipulation between the Texas Utilities Company and the defendants herein, which stipulation appears at p. 167 of the Statement of Evidence herein, the said Exhibits respectively appearing at pp. 186, 196, and 197, thereof.

# United States Court of Appeals for the District of Columbia

**OCTOBER TERM, 1935**

## No. 6580

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

*vs.*

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; JOHN J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES, W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DIVISION OF DISBURSEMENTS OF THE TREASURY OF THE UNITED STATES, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.


| | Original | Print |
|---|---|---|
| Caption | a | 1 |
| Memoranda: Bill of Complaint filed, temporary restraining order filed, bond of plaintiff for $5,000 filed | 1 | 2 |
| Motion of Ickes et al. to dismiss bill | 2 | 2 |
| Motion of Morgenthau, Jr., et al., to dismiss bill | 5 | 4 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1935.

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| | Original | Print |
|---|---|---|
| Memoranda: Amended bill of complaint filed, order granting preliminary injunction filed | 7 | 5 |
| Motion of defendants to dissolve preliminary injunction | 8 | 6 |
| Fiat of Adkins, J. Second amended bill of complaint for an injunction and other relief | 9 | 6 |
| Order dismissing bill of complaint | 40 | 32 |
| Appeal noted by plaintiff, bond for costs on appeal fixed, &c. | 41 | 32 |
| Order restoring preliminary injunction | 42 | 33 |
| Memorandum: $50 deposit in lieu of cost bond | 43 | 34 |
| Assignment of errors | 44 | 34 |
| Designation of record | 45 | 35 |
| Clerk's certificate | 47 | 36 |

# United States Court of Appeals for the District of Columbia

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No. 6580

ALABAMA POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator, et al.

---

*a* Supreme Court of the District of Columbia.

In Equity.

No. 59071.

ALABAMA POWER COMPANY, a Corporation, Plaintiff,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof; John J. Madigan, Acting Executive Officer Thereof, et al., Defendants.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

Equity.

No. 59071.

ALABAMA POWER COMPANY, a Corporation, Plaintiff,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof; John J. Madigan, Acting Executive Officer Thereof; F. E. Schnepfe, Director of Projects Division Thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States, Defendants.

*Memoranda.*

July 24, 1935.—Bill of Complaint filed.

July 25, 1935.—Temporary restraining order, filed. Bond of Plaintiff for $5,000, filed.

2 *Motion to Dismiss the Bill of Complaint of the Defendants Harold L. Ickes, as Federal Emergency Administrator of Public Works, Horatio B. Hackett, as Assistant Administrator, John Herrick, as Executive Assistant, J. J. Madigan, as Acting Executive Officer, and F. E. Schnepfe, as Director of the Projects Division of said Administration.*

Filed July 31, 1935.

* * * * * * *

Come now the said defendants, by their attorney below named, and move the Court to dismiss the bill of complaint, and as grounds for said motion say:

1. The bill of complaint does not state any matter in equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

2. The bill of complaint seeks an injunction to restrain the defendants from performing certain agreements entered into between the Federal Emergency Administrator of Public Works, Harold L. Ickes, and the Cities of Decatur, Florence, Sheffield and Tuscumbia, Alabama, for the purpose of constructing or financing the construction of electricity generating and distributing systems in said Cities. The said Cities are indispensable parties to such a suit and are not joined.

3. The said suit does not present a justiciable controversy of which the Courts of the United States or of the District of Columbia have jurisdiction.

4. The plaintiff does not allege the necessary injury or interest which entitle it to bring this action or obtain the relief prayed.

5. The bill of complaint does not show that the acts threatened by the defendants will injure any right of the plaintiff.

6. The plaintiff's capacity as a federal taxpayer is insufficient to enable it to challenge the constitutionality of the Act referred to in the bill of complaint, viz., Title II, Secs. 202, 203 of the National Industrial Recovery Act, or the acts of the Administrator thereunder.

7. The plaintiff's capacity as a taxpayer of each of said Cities and of the State of Alabama and other taxing districts thereof is insufficient to enable it to challenge the constitutionality of said Act or the acts of the Administrator thereunder.

8. The Constitution, Article 1, Section 8, empowers Congress to appropriate to provide for the general welfare of the United States.

9. No constitutional rights of the plaintiff are impaired or destroyed by the acts alleged to be threatened by the defendants.

10. The acts alleged to be threatened by the defendants are authorized by law.

11. The agreements challenged are authorized by the laws of Alabama and have been upheld by the Supreme Court of Alabama and the United States District Court for the Northern District of Alabama; and the decisions of said Courts are binding on this Court.

4 12. The bill of complaint does not state a cause of action cognizable in equity.

HENRY T. HUNT,
*Special Assistant to the Attorney General*
*as Attorney for said Defendants Ickes et al.*

Service acknowledged July 30, 1935.

EDWARD B. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
*Attorneys for Plaintiff.*

5 *Motion of Defendants Henry Morgenthau, Jr., W. A. Julian and Guy Allen to Dismiss Bill of Complaint.*

Filed July 31, 1935.

* * * * * * *

Come now the defendants, Henry Morgenthau, Jr., Secretary of the Treasury of the United States, W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States, and move the Court to dismiss the bill of complaint; and as grounds for said motion, say:

1. That the bill of complaint does not state any matter in equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

2. That the cities of Decatur, Florence, Sheffield and Tuscumbia, Alabama, are indispensable parties to said suit, and are not named as parties thereto, nor is any of them named as party thereto.

3. That said suit does not present a justiciable controversy over which the courts have jurisdiction.

4. That the plaintiff does not allege the necessary injury or interest which entitles it to bring this action or obtain the relief prayed for.

5. That the bill of complaint does not show that the acts threatened by these defendants will injure any right of the plaintiff.

6. That the plaintiff's capacity as a Federal tax-
6 payer or as a State taxpayer is insufficient to enable it to challenge the constitutionality or illegality of the

acts of Congress, or alleged acts or alleged threatened acts of defendants referred to in the bill of complaint.

7. That the power of Congress to appropriate money is not confined to the enumerated powers expressed in Article I of the Constitution.

8. That no constitutional rights of the plaintiff are impaired or destroyed by the alleged acts or threatened acts of these defendants.

9. That the alleged acts and threatened acts are authorized by law.

10. That the statutes referred to in the bill of complaint, against which plaintiff complains, are not unconstitutional.

11. That the bill of complaint fails to allege any facts showing any legal injury to the plaintiff, threatened or otherwise, as the basis for which it may maintain this suit.

12. That the facts alleged in the bill of complaint show that this is a suit against the United States, and the United States has not consented to be sued.

13. That the bill of complaint does not in other respects state a cause of action cognizable in equity.

14. And for other reasons apparent of record.

LESLIE C. GARNETT,
*United States Attorney,*
DAVID A. PINE,
*Assistant United States Attorney,*
*Attorneys for Defendants*
*Morgenthau, Julian and Allen.*

Received copy of the above motion to dismiss this 31st day of July, 1935.

EDWARD B. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
*Attorneys for Plaintiff.*

7 *Memoranda.*

August 1, 1935.—Amended Bill of Complaint filed.

August 2, 1935.—Order granting Preliminary Injunction filed.

8 *Motion to Dissolve Preliminary Injunction and to Dismiss the Bill of Complaint of the Defendants Ickes, Hackett, Herrick, Madigan and Schnepfe.*

Filed September 20, 1935.

* * * * * * *

Come now the said defendants and move the Court to dissolve the preliminary injunction allowed herein by order dated August 2, 1935 and also move the Court to dismiss the bill of complaint herein, on the following grounds:

1. These defendants renew their motion to dismiss the bill of complaint herein on the grounds in said motion stated, which motion was by said order of August 2 continued subject to the right of any party to call up the same for hearing on notice.

HENRY T. HUNT,
*Special Assistant to the Attorney General as Attorney for Defendants Ickes, Hackett, Herrick, Madigan and Schnepfe.*

Service acknowledged August 28, 1935.
HOWARD C. WESTWOOD,
*Attorney for Plaintiff.*

9 Leave to file, granted. Jesse C. Adkins. Oct. 14", 1935.

*Second Amended Bill of Complaint for an Injunction and Other Relief.*

Filed October 14, 1935.

* * * * * * *

Now comes the plaintiff, and by leave of Court files this its amended bill of complaint, and for its causes of action against the defendants alleges:

Paragraph I.

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, is a resident and citizen of the State of Alabama, and has its principal office and cor-

porate domicile in the City of Attalla, Alabama, and sues in its own right.

Paragraph II.

The defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found within the District of Columbia, and are more particularly identified as herein specifically set forth:

Harold L. Ickes is the duly appointed, qualified, and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United States of America dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act".

Horatio B. Hackett is the duly appointed, qualified, and acting Assistant Administrator of PWA.

John Herrick is the duly appointed, qualified, and acting Executive Assistant of PWA.

John J. Madigan is the duly appointed and qualified Acting Executive Officer of PWA.

F. E. Schnepfe is the duly appointed, qualified, and acting Director of Projects Division of PWA.

Henry Morgenthau, Jr. is the duly appointed, qualified, and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. Julian is the duly appointed, qualified, and acting Treasurer of the United States and, as such, is under the supervision of the Secretary of the Treasury, in control of the disbursement of the public funds of the United States.

Guy Allen is the duly appointed, qualified, and acting Chief Disbursing Officer of the Treasury Department and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual drawing and issuing of checks on behalf of the United States and the actual disbursements of the public funds of the United States.

Each of the foregoing officers or employees is sued on account of acts which he threatens to perform under the pretended authority of Title II of the National Industrial

Recovery Act as extended by section 12 of the Emergency Relief Appropriation Act of 1935 and paragraph (a) of the President's Executive Order of June 7, 1935.

11 Paragraph III.

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

Paragraph IV.

Plaintiff alleges that by its charter it has the right to manufacture, supply and sell to the public electric energy produced either by steam or by water as a motive force, or by both, for lighting, heating, power and other purposes. Plaintiff now owns and operates electric public utility properties, serving the public in sixty-five of the sixty-seven counties of the State of Alabama. These properties consist of hydro-electric and of steam generating plants, of high tension transmission lines, of distribution lines, and all equipment and facilities necessary for use in generating, transmitting, distributing, metering and delivering electric energy to meet the demands of electricity consumers in the State of Alabama.

Plaintiff is now serving, directly, and indirectly, approximately two hundred thousand (200,000) customers within said State, and its gross electrical revenue received therefrom in 1934 was approximately Fifteen Million Dollars ($15,000,000). Plaintiff's system is an integrated whole, coordinated so as to anticipate future needs and growth of the communities in the State of Alabama, and represents intensive application of the economies of large-scale, integrated power development. The loss of substantial numbers of its customers in any particular locality would materially impair the benefits to it and its customers derived from such integration.

Plaintiff's system is modern and efficient and in all respects equipped to furnish the public in Alabama with electricity service according to the most advanced standards of electrical engineering. The capacity of its hydro-electric plants alone is, even at the lowest water levels on record, adequate to furnish nearly 40% more than the present demand upon it for electricity within said State,

12

a capacity ample to supply all additional uses and users which may reasonably be foreseen in the future.

Among other communities served by said system are the City of Decatur, County of Morgan, the City of Florence, County of Lauderdale, and the Cities of Sheffield and Tuscumbia, County of Colbert. These cities are located in close proximity to each other in the northwestern portion of the State of Alabama, and together form a vital link in the plaintiff's system in that region. The following table indicates the approximate population of each of said cities, the approximate number of customers served by plaintiff therein, and the gross revenues of plaintiff from its electrical operations therein for the twelve months ended December 31, 1934:

| City | Approximate Population | Approximate No. of Customers | Gross Revenues of Plaintiff from such electric operations for year ending December 31, 1934 |
|---|---|---|---|
| Decatur | 15,593 | 3,247 | $240,300.55 |
| Florence | 11,729 | 2,284 | 170,580.44 |
| Sheffield | 6,221 | 1,291 | 93,783.54 |
| Tuscumbia | 4,533 | 928 | 44,281.44 |
| | 38,076 | 7,750 | $548,945.97 |

Paragraph V.

The plaintiff's system, including that portion represented by the aforesaid four cities and the customers therein, is served almost entirely by plaintiff's hydro-electric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, which was constructed by authority of an Act of Congress (34 Stat. 1288), whereby plaintiff was granted a license to build a dam across said river, a navigable water of the United States, at the location named, for the improvement of navigation on such river and the development of the water power inherent therein; and Mitchell Dam and Jordan Dam, likewise on the Coosa River in Alabama; and Martin Dam on the Tallapoosa River in Alabama, which latter three dams were constructed
13 under licenses from the Federal Power Commission, authorized by the Federal Water Power Act (41 Stat. 1063). In granting such licenses the Federal Power Commission in each instance found:

1. That each of such dams on the Coosa River and the dam on the Tallapoosa River were necessary and conven-

ient for the development and improvement of navigation and utilization of power in the respective rivers;

2. That such dams were best adapted to a comprehensive scheme of development and utilization of such waterways for such purposes;

3. That there was a market in Alabama for the power output of such plants;

4. That such dams were justified in the public interest.

Under and by such licenses, plaintiff was required to expend large sums in preparing certain portions of the river beds for future navigation to and through such dams and in the building of piers in the streams to form ultimate navigation guides to such locks; and, in addition, so to construct such dams that locks could be erected therein as and when the United States determined to complete the navigation from one pool level to the next; by the terms of the licenses, the licensee was required to permit of discharge through its dams, free of cost to the United States, of such part of the flow of the river necessary for the purpose of such lockage and to install such lights, signals, and power for the operation of such navigation structures as might be installed in the future by the United States; and with respect to Lay Dam, the plaintiff is required to convey to the United States a right of way around the end of such dam, and by the subsequent licenses issued to the plaintiff under which Mitchell Dam was erected, the plaintiff was required to make such excavations and perform such other channel work to complete a passage way from the lock around Lay Dam to the pool level created by Mitchell Dam as might be necessary;

and in connection with all such work plaintiff spent
14 a large amount of money and has obligations in connection with the future use of such facilities and locks for navigation purposes in a sum that is not capable of present ascertainment. Under and by virtue of such licenses, plaintiff was required also to make such installations in the Coosa River projects as the Federal Power Commission should deem necessary from time to time to supply adequately the reasonable market demands of the public. Such hydro-electric projects on the Coosa and Tallapoosa were built at a cost to the plaintiff of an amount in excess of $60,000,000. The completion of such projects on the Coosa River created contiguous slack water pools of 57 miles in length, and when such pools are connected by locks

placed in the aforementioned dams such pools will afford a nine-foot depth navigation on such river for a distance of 49 miles.

Plaintiff in good faith accepted the licenses from the Federal Power Commission and built Mitchell and Jordan Dams, resulting in the creation of navigable features of the Coosa and Tallapoosa Rivers as set out above, and in the improvement of the navigable features of the Alabama River, all with the agreement and understanding under the Federal Water Power Act and the licenses issued to plaintiff thereunder that the plaintiff would secure, as the consideration moving to it for the investment in excess of $60,000,000 made under the licenses so issued, the right and privilege freely to serve the market in Alabama with electric energy.

Paragraph VI.

Plaintiff is authorized by the laws of the State of Alabama to construct, own, operate, and maintain its plant facilities and systems in each of the municipalities in which it renders electric service, including Decatur, Florence, Sheffield and Tuscumbia.

On October 16, 1919 the City of Decatur granted to plaintiff a thirty-year electric franchise, the effectiveness of which was conditioned upon plaintiff's connecting its system in such city with its hydro-electric transmission system within a period of three years. On January 27, 1920 plaintiff made this connection and on such date such franchise became effective for a period of thirty years, is now in full force and effect, and will not expire until January 27, 1950.

In the year 1902 the cities of Florence, Sheffield and Tuscumbia each granted plaintiff's predecessor in interest an electric franchise. Such franchises were validly assigned to this plaintiff in 1925. By their terms the franchises so granted by the cities of Sheffield and Tuscumbia expired in October, 1932, and that so granted by the City of Florence expired in March, 1933. Since the expiration of these franchises plaintiff has continued to supply the cities of Florence, Sheffield and Tuscumbia and the inhabitants thereof with electric service and during such period has paid to these cities annual licenses and privilege taxes for the operation of an electric utility and has sold to these cities

electric light and power for lighting the streets and public buildings and other public places therein. These three cities have given plaintiff no notice to cease the use of the streets, alleys, and other public places in supplying them and their inhabitants with electric light and power and have given no notice to plaintiff to remove its poles and wires from the streets, alleys, and other public places therein, but have continued to utilize plaintiff's facilities and to receive and avail themselves of plaintiff's service.

Plaintiff is the only person, firm or corporation engaged in supplying electric light and power to the four cities named herein and their inhabitants and is the only person, firm or corporation now able to supply electric light and power to such cities and their inhabitants.

Paragraph VII.

The plaintiff's properties, plants, lines, and other facilities are modern and efficient and the plaintiff is
16 equipped to and does render efficient and adequate electric utility service in all the municipalities and rural districts in which it operates, including the aforesaid four cities, and possesses facilities of adequate capacity to continue the rendition of such type of service for a considerable time in the future without substantial additions thereto.

The rates for sale of electric power and energy of the plaintiff and the character of its service in the State of Alabama are subject to regulation of and are regulated by the State of Alabama through its Public Service Commission; and the rates now in effect in the territory served by the plaintiff in the State of Alabama and in the four cities aforesaid are rates approved as reasonable by, and placed in effect pursuant to order of, the Alabama Public Service Commission.

Paragraph VIII.

Plaintiff alleges that its electricity business in the aforesaid four cities is conducted pursuant to valid and subsisting franchise privileges granted to it by the Government of the United States through the Act of Congress and the licenses of the Federal Power Commission referred to in Paragraph V, and by the aforesaid four Cities, as alleged in Paragraph VI.

In reliance upon the grant of such franchise privileges, many thousands of dollars have been invested in the plaintiff's stocks and bonds, large amounts of which are held and owned by the general public, a very substantial part of its bonds and preferred stock having been sold to its customers and to other citizens and investors residing in the territory in which it operates.

Paragraph IX.

Plaintiff is a taxpayer of each of the said Cities of Decatur, Florence, Sheffield and Tuscumbia, and of the Counties in which such Cities are located, and with respect to its electrical properties and operations in each of
17 said Cities has paid to said Cities and said Counties many thousands of dollars in taxes in the past, and for the twelve months ended December 31, 1934, has paid or incurred the liability to pay such taxes as indicated in the following table:

| City or Town | Tax Paid | County | Tax Paid |
|---|---|---|---|
| Decatur | $6,082.46 | Morgan | $10,070.71 |
| Florence | 5,319.20 | Lauderdale | 4,305.52 |
| Sheffield | 5,350.60 | Colbert | 12,713.72 |
| Tuscumbia | 1,912.95 | Colbert | 12,713.72 |

Plaintiff is likewise a taxpayer of the State of Alabama, and with respect to its electrical properties and operations in said State has paid to said State many thousands of dollars in taxes in the past, large portions of which sums are paid back by the State to the various communities, including the four Cities aforesaid, to be expended by such communities for their municipal purposes; and for the twelve months ended December 31, 1934, plaintiff has paid, or incurred the liability to pay, such taxes to the State in excess of the sum of Nine Hundred Thousand Dollars ($900,000.00). Plaintiff has incurred the liability to pay taxes to the Cities, the counties, the State, and other political subdivisions, for the current tax year 1935, in approximately the same amounts as paid and incurred for the year 1934, as aforesaid.

Paragraph X.

Plaintiff is a taxpayer of the United States, and with respect to its electrical properties and operations in the State of Alabama, including the properties and operations

in each of the aforesaid four Cities, has paid to the United States many thousands of dollars in taxes in the past; and for the twelve months ended December 31, 1934, has paid, or incurred the liability to pay, such taxes in the sum of Two Hundred Seventy-Five Thousand Dollars ($275,000.00).

Paragraph XI.

The PWA, under the direction of defendant Ickes, has conceived, and for some time past has been executing throughout the country, a plan to fix the rates of privately owned electricity utilities at levels determined by PWA to be "socially desirable" and to promote public ownership of electricity utilities, regardless of local state policy, as a "yardstick" of electricity rates and service to which privately owned electricity utilities must conform. This plan is not intended to have and, in fact, does not have any relation to interstate commerce; its intended and actual effect is control and regulation of entirely local and intrastate commerce.

The plan is effectuated by soliciting and inducing municipalities and other political subdivisions of the several states to permit PWA to institute and to carry out, as Federal Public Works Projects, the construction of electricity generating and distributing systems within such subdivisions, such systems being planned, built and financed by and under the control and direction of PWA, and being operated by PWA through its retention of absolute control over the rates to be charged for the service of such systems when completed.

Upon tentative selection of an area for such a Project, PWA usually informs existing private electricity utilities in such area that to escape being superseded by or suffering competition from such a system such private utilities must establish rates satisfactory to PWA and, in effect, consent to continuing PWA regulation of their rates under the threat of destruction. The rates so exacted are arbitrarily set by PWA, do not provide a reasonable return to such utilities upon their investment, are much less than those fixed by authorized state regulatory bodies, and are determined without hearing such utilities and without any consideration whatever of the elements required by the due process clauses of the Fifth and Fourteenth Amendments

to be considered in rate regulation. Plaintiff cannot aver with particularity the level to which such privately owned utilities are required to conform because PWA has never adopted definite criteria but acts in each case according to an arbitrary and vaguely formulated conception of
19 "social desirability". In general, however, such level is that at which a system built and operated by PWA as aforesaid would earn enough to pay operating costs without provision for Federal, state, or local taxes, and to repay over a long period of time so much of the cost of construction thereof as is represented by the pretended loan made by PWA as hereinafter described; and in many instances PWA requires a level even lower.

If the existing private utilities in such area conform to the standard so fixed by PWA, PWA usually suspends consummation of such a Federal Public Works Project for a time sufficient to enable it to be assured that such conformity is in good faith and permanent and then, if satisfied, PWA usually abandons the project. Otherwise PWA proceeds to consummate the project, as heretofore and hereafter described, and either subjects the private utilities to rate-war to attain the rate level desired by PWA and if possible to drive such utilities out of business, or induces the state regulatory bodies to revoke the privileges of such utilities to do business.

This plan is frankly acknowledged by PWA in public press releases, in public statements of the Administrator, in instructions given to PWA agents charged with the administration of PWA functions, in negotiations with existing private utilities, and otherwise.

In deciding thus to build electricity generating and distributing systems, the sole consideration entertained by PWA is the rate level of existing privately owned utilities. The extent of unemployment in the vicinities, or elsewhere, and the relation between the employment given by such a Project and the character of workers unemployed, the dependability and economic soundness of existing private utilities, the capacity of the areas to absorb increased electricity production, and other considerations relating to the need for such a PWA electricity system are excluded entirely by PWA in reaching its decision to build and operate such a Project.

20 To induce the necessary cooperation of municipalities and other political subdivisions in the vari-

ous states and to procure their consent to such Federal Public Works Projects and to the regulation of the rates of existing privately owned utilities by PWA in accordance with the aforesaid plan, PWA, by advertising and other newspaper publicity and by circulars and direct statements made to municipalities by authorized agents, has represented that it would authorize and direct the construction, as Federal Public Works Projects, of electricity generating and distributing systems, to become the property of such municipalities. The representations have been that approximately thirty percent of the cost of the Project would be an outright gift, the balance of the cost to be repaid to PWA, if at all, out of the revenue of the system; and that thus no risk would be incurred by the municipality. When the municipality consents to such a Project and PWA decides to threaten existing utilities with its consummation, a so-called loan and grant arrangement is entered into similar to the so-called agreements between PWA and the Cities of Decatur, Florence, Sheffield and Tuscumbia, hereinafter described. Such an arrangement constitutes a pretense and sham in that it does not in fact provide for a loan but merely for the possible recapture of a part of the cost of such projects out of the earnings thereof, and imposes no obligations upon said municipalities and confers no authority upon them in the construction thereof, all as more specifically hereinafter set forth.

All the acts of the defendants hereinafter complained of are done or threatened in pursuance of the plan hereinbefore alleged; that is to say, PWA determined that plaintiff's rates in the aforesaid Cities were higher than rates determined by PWA to be socially desirable and, in this instance without affording the plaintiff the opportunity usually afforded such utilities, in accordance with the said plan, to conform to the rates determined upon by PWA in such cases, authorized the Federal Public Works
21 Projects hereinafter described solely in order to drive plaintiff out of business in the aforesaid four Cities and attain the rate level desired by PWA. The aforesaid four Cities were induced by PWA to consent to said Federal Public Works Projects and to take the steps hereinafter alleged in cooperation therewith and with PWA by the representations hereinbefore alleged.

Paragraph XII.

The aforesaid four Cities, moved by the actions and inducement alleged in Paragraph XI, through their respective mayors, filed with PWA applications for Federal Public Works Projects consisting of electric distributing systems to be owned by said Cities, respectively.

While the procedure pursued by PWA, defendant Ickes and his agents in passing upon such applications does not provide for a hearing from those whose property and rights will be injured or destroyed through the authorization and construction of such municipal systems, plaintiff requested and sought a hearing before PWA relative to said applications of the aforesaid Cities. Plaintiff has, however, constantly been denied the privilege of such hearing. Nevertheless, plaintiff filed with PWA a written protest against the approval of the applications of said Cities, except in the case of the City of Florence. Such protest set out in substance the facts heretofore and hereafter alleged in this bill. There is no further board, agency or official of the United States to whom plaintiff may apply to prevent the consumation of the Projects in said Cities. Consequently, plaintiff has exhausted all administrative remedies which it could possibly have to prevent such action.

Notwithstanding plaintiff's protests of the applications aforesaid, plaintiff is informed, believes and avers that such protests were given no consideration whatsoever by PWA, but that, for no purpose other than that of driving down plaintiff's rates and destroying plaintiff's business in accordance with the plan of PWA aforesaid, *and upon findings* that the action of PWA would in fact destroy and drive out plaintiff's business in said Cities, PWA approved such Public Works Projects for said Cities, to be carried out under pretended loan and grant agreements with the Cities at the times and in the amounts set out hereafter, the funds to be used in the erection and construction, as Federal Public Works Projects under the direction and control of PWA, of complete electric distribution systems in the Cities to serve the same parties and purposes as are now served by plaintiff therein. The amounts proposed to be granted to the Cities are equal to thirty percent of the cost of labor and materials to be em-

ployed in the construction of such electric distribution systems. The pretended loans and grants plaintiff alleges, upon information and belief, to be of the approximate amounts set out as follows:

| City | "Loan" | Grant |
|---|---|---|
| Decatur | $268,000 | $82,000 |
| Florence | 336,000 | 100,000 |
| Sheffield | 187,000 | 43,000 |
| Tuscumbia | 105,000 | 25,000 |

Paragraph XIII.

Plaintiff is informed and believes and so alleges that the aforesaid plan to construct the said electric systems as Federal Public Works Projects in said Cities for the purposes and objects hereinbefore alleged will immediately be carried out by PWA and the defendants herein, unless restrained, under the following arrangement:

The defendant Ickes and the said Cities have entered into pretended "loan and grant agreements," which, in effect, provide that the defendant Ickes and his agents shall construct said electricity distribution systems in said Cities and finance said construction by granting outright to said Cities 30 per cent of the cost of labor and materials employed in the construction of such systems, and by the pretense of lending to said Cities, by pretended purchase of their bonds, to be used for such financing and con-
23 struction, the amounts heretofore alleged. Said grants will be pure gifts or bounties, designed solely to induce the Cities to enter into such arrangements and to insure the accomplishment of the wishes of PWA and these defendants with respect to the establishment of municipal facilities competing with and superseding the plaintiff. The said Cities have agreed in return that said funds will be made available to them upon requisition only in such amounts as defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of defendant Ickes is needed to complete the Projects; that the proceeds of the "loans" and grants shall be deposited by the Cities in such banks as defendant Ickes chooses; that such proceeds shall be expended by the Cities only as defendant Ickes consents; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be accord-

ing to the will of defendant Ickes; that all work on the projects shall be done under the regulation of defendant Ickes; that no contractor or subcontractor shall bid for or work upon such projects without the approval of defendant Ickes; that all contractors and subcontractors shall be equipped with bonds and insurance as defendant Ickes desires; that said Cities shall engage in such litigation as defendant Ickes deems advisable with respect to irregularities, or defects, or illegalities in the bonds; that defendant Ickes may cancel the agreements with the Cities at any time he wishes, if in his opinion said Cities have unreasonably delayed in carrying out any of their duties; that the aforesaid funds shall be available to the Cities only subject to the power of defendant Ickes to withhold them if he deems the Cities' budgetary situations to be unsatisfactory, or if he is not satisfied that the Cities have complied with all provisions of the agreements; and that in other respects the will of defendant Ickes shall control the Cities' actions, even to the extent of the naming of the projects. It is further a part of said arrangements
24 that the defendant Ickes, or his agents, will be permitted to fix, and from time to time to change, minimum rates of pay and maximum hours for all persons employed on such construction, to enforce employment preferences in favor of ex-service men and others, to designate agencies through which workmen may be employed, to direct the use of human labor in place of machinery, to require disclosure to PWA of all information which PWA may desire with respect to such construction work, to require that all the disputes between the Cities and the contractors or subcontractors, and all labor disputes arising in connection with the construction, shall be submitted to the Board of Labor Review or other agency of PWA for final determination, and in other ways to regulate the construction of such distribution systems. It is a part of said arrangements that the Cities shall undertake to obtain any other funds deemed by defendant Ickes necessary to complete such systems, in the manner and from sources prescribed by defendant Ickes; to operate the systems upon completion and furnish electricity to consumers now being served by plaintiff; never to charge rates at a level more than a level approved by defendant Ickes; to pay from the general funds of the Cities, at current selling rate sched-

ules, for energy used by the Cities themselves; and in other ways to submit to the will and regulation of defendant Ickes with respect to the operation of such systems. The said pretended bonds to be issued by the Cities, through the purchase of which the pretended loans from PWA are to be made, are not general obligations of the Cities, but it is expressly understood and agreed between said Cities, respectively, and PWA that said bonds shall not constitute an indebtedness of said Cities within the meaning of any provision or limitation of the Constitution of the State of Alabama and shall never impose a pecuniary liability upon said Cities or charge against their general credit. Said pretended bonds are payable solely from the revenue to be derived from said Projects after provision for cost of operation and maintenance.

Paragraph XIV.

While the applications of the aforesaid Cities for such Projects were pending before PWA, plaintiff undertook to negotiate with the Cities for the sale to them of its properties located therein. Plaintiff offered to sell to the City of Decatur its distribution system located therein with all its customers attached, for the sum of $359,000, which plaintiff alleges was far below what said properties and business were worth. This offer was declined by said City, said City stating that the availability of a PWA loan and grant would not make it worthwhile for the City to make such a purchase. Plaintiff likewise offered to sell to the City of Florence its distribution system therein with all its customers attached, for the sum of $195,000, which said sum was much less than the properties and business were worth. The City of Florence also declined to make such purchase because of the availability of the loan and grant from PWA.

Plaintiff offered to sell to the City of Sheffield its distribution system located therein, with all its customers attached, for the sum of One Hundred Sixty-Four Thousand Dollars ($164,000.00), which said sum is much less than such properties and business were worth. The City of Sheffield likewise declined said offer. It admitted that said offer was reasonable, but in view of the availability of the PWA grant insisted that plaintiff allow it a discount of 30 per cent of the reasonable value of such properties.

Plaintiff offered to sell to the City of Tuscumbia its distribution system located therein, with all its customers attached, at the price of One Hundred Four Thousand Dollars ($104,000.00), which said sum is much less than such properties and business were worth. The City of Tuscumbia likewise declined said offer. It admitted that said offer was reasonable, but in view of the availability of the PWA grant insisted that plaintiff allow it a discount of
26 30 per cent of the reasonable value of such properties.

Paragraph XV.

Plaintiff is informed and believes, and therefore charges, that a part of the plan for the construction of municipal electric distributing systems in the Cities of Florence, Sheffield and Tuscumbia, induced by PWA as aforesaid, is that said Cities shall when said municipal systems are completed revoke and terminate plaintiff's right to carry on its business in each of such Cities and plaintiff will be compelled to abandon entirely its business, properties and systems in such Cities. If it were not for such plan and for such inducement of PWA plaintiff would in all reasonable probability continue to enjoy the right to carry on its business in each of said Cities for many years.

If the City of Decatur obtains in pursuance of the plan hereinbefore alleged such a Public Works Project it will operate such system in competition with plaintiff, and plaintiff will be compelled either to suffer substantial and continuous losses in its operations in such city or to abandon entirely its property and system therein, as shown by the fact that, in anticipation of receiving such a Project, the City authorities, at the instigation and direction of PWA, have made a house-to-house canvass of plaintiff's customers in such City, soliciting their patronage for the proposed municipal electric plant, and have reported to PWA that more than 95% of domestic, 70% of commercial, and 75% of industrial consumers in such City will take power from the municipal plant as soon as service can be begun.

If defendants are permitted to consummate such unlawful plan and make such pretended loans and grants to the Cities of Decatur, Florence, Sheffield, and Tuscumbia, plaintiff is informed and believes and therefore states that they will authorize and construct a large number of municipal

electric plants in many other cities and towns in the State of Alabama in which plaintiff is engaged in supplying electric public utility service, to be operated in ruinous
27 competition with plaintiff.

As heretofore alleged the business of the plaintiff is made up of a combination of businesses done by it in cities, towns, and rural areas in the State of Alabama as more particularly elsewhere alleged herein, all of which are connected with its system of transmission lines and served by its hydro generating plants. Each local business enables plaintiff better to serve the others and is incapable of withdrawal without substantial impairment of plaintiff's ability to serve the remainder of its customers. The withdrawal of a number of these local businesses would substantially impair plaintiff's ability to continue operation as a going concern in that it would destroy, make useless, and cause to lie idle much of plaintiff's modern, efficient and valuable properties, including dams, steam plant, transmission lines, and distribution systems and thereby would cripple plaintiff in the exercise of its rights, privileges and duties under its aforesaid franchises from the United States.

Paragraph XVI.

The threatened action of the defendants herein pursuant to the aforesaid arrangements with the Cities of Decatur, Florence, Sheffield and Tuscumbia, is null and void and without warrant in law, and the defendants are wholly without authority to perform any of the acts which said arrangements contemplate to be performed by them, as herein alleged, because:

(1) Section 202 of the National Industrial Recovery Act as extended provides that the Administrator shall prepare a comprehensive program of public works. Section 203 provides that the Administrator may construct, finance, or aid in the construction or financing of any public works project "included in the program prepared pursuant to Section 202." PWA has announced that allotments are being and will be made before such a comprehensive program is prepared. In line with this policy, allotments have been made in the absence of the preparation of such pro-

gram, no such program has ever been prepared, the
28 allotments herein and the action of the defendants in financing and constructing the proposed plants and systems are being performed in the absence of the preparation of such a program, and the projects herein alleged for the Cities of Decatur, Florence, Sheffield and Tuscumbia, have never been included in any such program. The only program ever prepared is the sum of the particular Projects which PWA has determined to carry out; this is not the preparation of a program under Section 202, but is a mere catalogue of action taken.

(2) The proposed pretended loans to the Cities of Decatur, Florence, Sheffield and Tuscumbia are in violation of the requirement of Section 203 of the National Industrial Recovery Act as extended that such loans by the United States be reasonably secured. Such loans are not and cannot be reasonably secured, because the bonds of the Cities, on the faith of which said loans are to be made, are null and void because based upon undertakings of the Cities which violate the law of the State of Alabama, and any payment for them by the defendants is unauthorized by the National Industrial Recovery Act as extended:

(a) The Cities have surrendered to PWA and defendant Ickes absolute discretion to determine rates, rules and regulations for electric service to be furnished by such municipal electric distribution systems, to determine the depositories for their funds, the types of plants which shall be constructed, the materials to be used, the contractors and sub-contractors who shall perform the construction, the hours and wages of men working thereon, the place whence such men shall be hired, and in many other ways to determine and control the construction and operation of such plants, the costs thereof, the time within which they shall be completed, etc. Such a delegation of discretion to PWA and defendant Ickes constitutes an unlawful delegation of the sovereign duties of the aforesaid Cities to foreign agents in violation of the laws of Alabama, and constitutes a violation of the laws of Alabama with respect to competitive bidding.

29 (b) For reasons heretofore and hereafter set out, the contemplated grants and loans by PWA are invalid and therefore the Cities will be obligated immediately

to refund to PWA the amounts of the grants and loans so illegally made and accepted by them, and the Cities will thereby become indebted to PWA in violation of constitutional provisions of the State of Alabama with respect to the manner and the amounts of indebtedness which may be legally incurred by the Cities.

(c) The Cities have pledged the revenue from such municipal electricity systems to the payment of the issues of bonds and to the payment of other debts arising in connection with the construction of said systems in priority to the payment of general municipal expenses and the interest and principal on the general obligation bonds of the Cities now or hereafter outstanding, in violation of the laws of Alabama.

(3) The Projects herein complained of are not authorized by the National Industrial Recovery Act as extended because they are not reasonably designed or capable of increasing employment quickly, or relieving unemployment. Plaintiff is informed, believes and so alleges that of such unemployment as exists in the aforesaid Cities or their vicinities, there is virtually none among persons who can be employed on projects of this sort. The projects will require almost altogether skilled workmen and have no reasonable relation to the unemployment situation in the Cities or their vicinities. Moreover, they will inevitably cause permanent unemployment of many, and perhaps eventually all, of those now in plaintiff's employ in said Cities.

(4) Said Projects are not authorized by the National Industrial Recovery Act as extended because they are not of the type or character contemplated thereby. Furthermore, the authority to make grants such as those contemplated, expired on June 16, 1935, by virtue of Section 201 (d) of said Act, which authority is not extended by the aforesaid Emergency Relief Appropriation Act of 1935.

(5) Said Projects are not authorized by Title II of the National Industrial Recovery Act as extended because they are wholly useless and wasteful, in that they duplicate and destroy plaintiff's existing, adequate, reasonable and satisfactory system. The Projects can result only in disastrous rate wars, as PWA proposes and intends, destructive of both plaintiff's facilities and the projects

themselves. The small demand in said Cities can support only one utility. The additional systems will be not only useless but predatory; their effect will be to decrease, instead of to promote the fullest possible utilization of the present productive capacity of the electrical industry, and particularly that portion of the industry carried on by plaintiff.

(6) Said Projects are not authorized by Title II of the National Industrial Recovery Act as extended because the undertakings exacted from the Cities by PWA and defendant Ickes and the proposed construction and operation of the electricity systems will violate the law of the State of Alabama. Among other things, such undertakings constitute an unlawful delegation to foreign agents, these defendants, of the obligations of said Cities under the law of Alabama as alleged in Sub-paragraph (2) hereof.

(7) Said Projects herein complained of are without warrant in said National Industrial Recovery Act as extended or in any law of or in the Constitution of the United States, but the action of the defendants in furthering said projects is in violation of the Tenth Amendment to the Constitution of the United States, because:

(a) As heretofore alleged, said projects are undertaken by the defendants solely for the express purpose of and pursuant to a publicly announced policy of controlling and lowering electricity rates within each State of the United States, and of making war upon creatures of the various States. Specifically, the Projects threatened, as herein alleged, are designed solely to afford consumers within the Cities of Decatur, Florence, Sheffield and Tuscumbia
31 with electricity rates at levels deemed by defendant Ickes and PWA to be "socially desirable," and to drive the plaintiff out of such Cities in accordance with the plan described in Paragraph XI hereof. Such action will in no manner affect interstate commerce; its effect is confined altogether to the inhabitants of said Cities, wholly within the State of Alabama.

(b) Said Projects are undertaken by the defendants solely for the purpose of furthering a policy of public ownership of electricity systems within each State of the United States, and specifically are designed merely to afford said Cities of Decatur, Florence, Sheffield and Tuscumbia an

opportunity to erect municipally owned electricity systems to serve as a "yardstick" for the demonstration of conceptions of rate regulation entertained by PWA and defendant Ickes and will in no manner affect interstate commerce; their effect is confined altogether to the inhabitants of the said Cities, wholly within the State of Alabama.

(c) Said Projects are to be constructed and operated under the absolute direction and control of the defendants, even to their most minute details, in matters having no relation to interstate commerce, and in a manner constituting usurpation of the local authority of the said Cities and assumption of control over their own affairs.

(8) In so far as said National Industrial Recovery Act as extended purports to confer upon said defendants, as officers of the United States, power to do any of the acts herein complained of, said Act and said purported power are void and without warrant in the Constitution of the United States, but are in violation thereof because:

(a) Neither Title II of said National Industrial Recovery Act nor the Emergency Relief Appropriation Act of 1935 extending such Title indicates any adequate legislative standard to guide these officers charged with the administration of said Title, but on the contrary seeks to delegate legislative power to the President and to such administrative officers in violation of Article I, Section 1; Article I, Section 8, Clauses 1, 2, and 18; and Article II, Section 1 of the Constitution.

32

(b) The funds of the United States available and to be used for the Projects herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such authority conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said projects will not promote the general welfare of the United States, but are exclusively for the local and private welfare of the consumers of electricity in said Cities. Said projects will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful dupli-

cation of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary and incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manufacturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purpose would be merely for the private gain and profit of such manufacturers, sellers and contractors.

(c) Neither Title II of said National Industrial Recovery Act as extended nor any administrative regulation or procedure followed by PWA or the defendants in administering said Title provides for any method whereby persons whose rights will be injured and whose property will be taken by action of the defendants may be given an opportunity for full and adequate hearing; nor has this plaintiff been afforded any such opportunity, although the
33 defendants herein threaten to take its property by virtue of unlawful and destructive competition and the threat thereof. Such denial of a hearing constitutes a violation of the due process clause of the Fifth Amendment of the Constitution.

(9) The defendants are threatening arbitrarily and maliciously to injure and destroy the plaintiff's business and property in said Cities, have not afforded plaintiff a hearing and have refused to give plaintiff an opportunity to lower its rates to a level deemed desirable by PWA, such as is given other companies in a position the same as that occupied by plaintiff, all in contravention of the due process clause of the Fifth Amendment.

(10) If it be that these defendants seek and find some purported authority in the Emergency Relief Appropriation Act of 1935 further than that granted in paragraph (a) of the President's Executive Order of June 7, 1935, any such further authority is baseless and void for the reasons set out in this Paragraph XVI.

Paragraph XVII.

Action by these defendants carrying out said arrangements with said Cities will aid and abet the Cities of Decatur, Florence, Sheffield and Tuscumbia in violating the law and Constitution of the State of Alabama, as herein more

particularly alleged in Paragraph XVI, sub-paragraphs (2) and (6), and will therefore be unlawful and void.

Paragraph XVIII.

Plaintiff is informed and believes and therefore alleges, that the said Cities of Decatur, Florence, Sheffield and Tuscumbia and the said defendants herein are, in accordance with the aforesaid unlawful arrangements between PWA, defendant Ickes and the Cities, combining and conspiring together and with each other to consummate their joint projects of constructing and operating said electricity plants and distributing systems and to injure the
34 plaintiff, and will, unless restrained by this Court, immediately proceed so to do. Pursuant to such combination and conspiracy PWA and defendant Ickes have entered into the aforesaid loan and grant agreements with said Cities and the other details of said arrangements. Said Cities will immediately present to defendant Ickes, or one or more of the defendants, officers of PWA, or their agents, initial requisitions of money to be furnished pursuant to said agreements, and said defendants, or one of them, will, unless restrained by this Court, pay over to said Cities all or a large portion of the loan and grant of public funds of the United States as provided in said agreements, and will immediately take further steps in consummating said projects. Each and all of the foregoing threatened acts of said defendants will result in immediate and irreparable injury, loss and damage to plaintiff, as hereinafter more specifically alleged.

Paragraph XIX.

If the defendants, or any of them, shall carry out the provisions of the said arrangements with the Cities, or do any or all of the acts threatened by them as hereinbefore alleged, the property right of plaintiff to enjoy its federal and municipal franchise free from injurious competition brought about by unlawful means and to conduct its business and charge rates free from interference and domination by any agency of the federal government will immediately be invaded and destroyed; the value of the franchises and business of plaintiff in said Cities and of the tangible and intangible property acquired and used therein, and of the private funds invested and risked therein, repre-

sented by the capital stock and bonds of plaintiff, will immediately be greatly damaged and impaired, and finally rendered utterly worthless. It will immediately be impossible for plaintiff to obtain new customers or to increase the consumption of electricity by its present customers, but, on the contrary, plaintiff will immediately lose great numbers of its customers and must engage in a destructive rate war with the danger of being forced altogether to retire from business; furthermore, by reason of said unlawful projects, it will be impossible for plaintiff to sell or otherwise to dispose of its business and property save as junk and waste. The plaintiff as a taxpayer to the United States will be specially injured as in this paragraph set forth, and will have been and in the future will be subjected to a deprivation of its property by taxation for a purpose without warrant in law or in the Constitution and in violation thereof. The plaintiff as a taxpayer to said Cities, Counties and State will be specially injured as in this paragraph alleged, and will have been and in the future will be subjected to a deprivation of its property by taxation for a purpose and in a manner without warrant in the laws or Constitution of Alabama or in the laws or Constitution of the United States and in violation thereof, and as such taxpayer its right that its municipal corporation shall not be forced to violate the law of the State of Alabama, and shall not enter into and be forced to carry out a relationship with others, specifically these defendants and PWA, who are without authority to enter into such a relationship, will be violated. By reason of all the foregoing allegations, the plaintiff, through unlawful interference with, injury to, and deprivation of its federal and municipal franchises, through unlawful deprivation of its property by taxation, and through unlawful deprivation and violation of its right that its municipalities shall not be forced to violate the law of Alabama and shall not enter into and be forced to carry out relationships with others who are unauthorized to enter into them, will suffer loss of its property without that due process of law guaranteed it by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States, and such injury and deprivation will constitute an immediate and irreparable loss, for which it has, and can have no adequate remedy at law.

36 Paragraph XX.

In so far as plaintiff sues as a taxpayer of the United States, of the State of Alabama, of the Counties of Morgan, Lauderdale and Colbert, or their subdivisions, or of the Cities of Decatur, Florence, Sheffield and Tuscumbia, it sues for all those persons similarly situated.

Paragraph XXI.

The said Cities of Decatur, Florence, Sheffield and Tuscumbia and the members of their governing bodies are not made parties defendant hereto because they are without the jurisdiction of this court, and service of process cannot be had upon them in the District of Columbia.

Paragraph XXII.

Plaintiff alleges that it is futile to ask the said Cities to rescind their unlawful agreements and arrangements with defendant Ickes and PWA; plaintiff has repeatedly and constantly protested to the Cities the invalidity of such agreements and arrangements, substantially on the grounds herein set forth, but the Cities persist in their determination to consummate the said arrangements and the projects.

Paragraph XXIII.

The said Cities have, as hereinbefore alleged, announced their intention to join with the defendants in the immediate consummation of the said projects, and plaintiff is informed and believes, and therefore alleges, that unless the defendants are immediately restrained from doing so, they will at once perform the acts herein complained of; plaintiff is further informed and believes, and therefore alleges, that the giving of notice of application for a restraining order would precipitate said unlawful acts and that said acts would do all the mischief complained of by the plaintiff herein and would result in immediate and irreparable injury, loss and damage to the plaintiff, whereas
37 restraint of the doing thereof until disposition of plaintiff's application for a temporary injunction has been made would result in no detriment or injury to the defendants.

Wherefore, the premises considered, the plaintiff prays:

(1) That process issue against the defendants requiring them to answer this bill (but not under oath or affirmation,

the benefit whereof is hereby expressly waived by the plaintiff).

(2) That this Court grant plaintiff a temporary restraining order against defendants, and each of them, enjoining each and all the defendants, their officers, agents and all persons acting in the aid of said defendants and their successors in office, from doing any act or thing to carry out any of the provisions of said unlawful arrangement with said Cities, and from, in any manner, aiding in the construction, or from financing the construction of said electricity generating and distributing systems in said Cities of Decatur, Florence, Sheffield and Tuscumbia; and, more specifically, from taking any steps to carry out any arrangement or agreement with the said Cities for the purpose of constructing or financing the construction of said electricity plant and systems in said Cities, from honoring any requisition and from transferring, lending, giving or disbursing to the said Cities any funds whatsoever for said purpose, and from taking any step whatever designed to aid or facilitate the financing or construction of said plant and system; such restraining order to be effective only until the matter of plaintiff's application for preliminary injunction shall be disposed of.

(3) That after notice and hearing, the Court enter a preliminary injunction to the same effect.

(4) And that upon final hearing, this Court enter a
38 final order and decree to the same effect.

(5) And for such other and further relief as to the Court may seem meet.

ALABAMA POWER COMPANY,
By P. W. TURNER,
*Its Vice-President.*

P. W. TURNER,
*Solicitor for the Plaintiff,*
*Birmingham, Alabama;*
EDWARD B. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
*Solicitors for the Plaintiff,*
*Union Trust Building,*
*Washington, D. C.*
NEWTON D. BAKER,
*Solicitor for Plaintiff,*
*Cleveland, Ohio.*

39 DISTRICT OF COLUMBIA, *ss:*

P. W. Turner, being duly sworn, deposes and says that he is Vice-President of Alabama Power Company, a corporation organized under the laws of the State of Alabama, the plaintiff named in the above entitled cause, that he has authority to make this affidavit in behalf of said corporation, that he has read the foregoing amended bill of complaint by him subscribed and knows the contents thereof and that the statements therein made are, true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he verily believes the statements to be true.

P. W. TURNER.

Subscribed and sworn to before me this 14 day of October, 1935.

[SEAL.] T. C. MEIDINGER,
*Notary Public.*

40 *Order Dismissing Bill of Complaint.*

Filed October 15, 1935.

* * * * * * *

This cause came on to be heard on the defendants' motion to dismiss the bill of complaint for want of equity, and the plaintiff having been granted in open court leave to file a second amended bill of complaint, and said bill having been filed and the parties having agreed that the said motion to dismiss should stand as to all the defendants against the second amended bill, and this court having heard the argument of the parties thereon, and being fully advised in the premises,

Now, therefore, on motion of the defendants, it is this 14th day of October 1935,

41 Adjudged, ordered and decreed that the motion of the defendants to dismiss the second amended bill of complaint be, and the same is hereby granted, and it is further

Adjudged, ordered and decreed that the second amended bill of complaint be and the same is hereby dismissed, and it is further

Adjudged, ordered and decreed that the preliminary injunction heretofore in this cause entered is dissolved.

Presented by:
ALEXANDER HOLTZOFF,
*Special Assistant to*
*the Attorney General.*

No objection as to form:
DEAN ACHESON,
*Attorney for Plaintiff.*

(Sgd.) JESSE C. ADKINS,
*Justice.*

From the foregoing decree the plaintiff, by its attorney; in open court, notes an appeal to the United States Court of Appeals for the District of Columbia and the cost bond on appeal is hereby fixed at one hundred dollars or in lieu thereof a cash deposit of fifty dollars.

(Sgd.) JESSE C. ADKINS,
*Justice.*

42 *Order Restoring Preliminary Injunction.*

Filed October 15, 1935.

* * * * * * *

This cause having come on to be heard on the defendants' motion to dismiss the second amended bill of complaint herein, and the said motion having been granted and the said bill having been dismissed, and the preliminary injunction heretofore entered having been dissolved, and a decree entered, and the plaintiff having in open court noted an appeal from such decree, thereupon, in open court, the plaintiff moved the court to restore the preliminary injunction during the pendency of the appeal and the defendants having represented that said injunction should be modified;

Now, therefore, it is this 15th day of October, 1935, ordered that during the pendency of the aforesaid
43 appeal, the defendants, Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, Horatio B. Hackett, Assistant Administrator thereof, J. J. Madigan, Acting Executive Officer thereof, F. E. Schnepfe, Director of Projects Division thereof, Henry Morgenthau, Jr., Secretary of the Treasury

of the United States, W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Disbursements Division of the Treasury of the United States, and each of them, their agents and all persons acting in aid of them and their successors in office, be, and they are hereby restrained from constructing or in any manner aiding in the construction of an electricity generating and distributing system in the Cities of Decatur, Florence, Sheffield or Tuscumbia, State of Alabama, or from transferring, lending, giving or disbursing to any of said Cities any funds whatsoever of the United States for the purpose of constructing or financing the construction by the said City of an electricity generating and distributing system and from doing any act or thing for the purpose of effecting or bringing about the transfer, loan, gift or disbursement to any of said Cities of any funds whatsoever for the said purpose; provided, that nothing in this order contained shall be construed to restrain said defendants or their agents pending this appeal from negotiating and entering into new contracts with said municipalities of Decatur, Florence, Sheffield and Tuscumbia, or any of them, terminating any existing agreement with any of said municipalities and from making any new offer to any of said municipalities.

By the Court.

JESSE C. ADKINS,
*Justice.*

*Memorandum.*

October 19, 1935.—$50 deposit in lieu of cost bond.

44 *Assignment of Errors.*

Filed October 21, 1935.

* * * * * * *

Now comes the plaintiff, and in its capacity as the owner of an electricity business with appendant franchise rights in the Cities of Decatur, Florence, Sheffield and Tuscumbia in the State of Alabama, and as a taxpayer of the United States, as a taxpayer of each of said Cities, of the Counties of Morgan, Landerdale and Colbert and of the State of Alabama, and assigns as error the action of the Court in the following matters:

1. The Court erred in sustaining the motion of the defendants to dismiss the second amended bill of complaint.

2. The Court erred in dismissing the second amended bill of complaint.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
*Attorneys for Plaintiff.*

Received a copy of the foregoing assignment of errors this 19 day of October, 1935.

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

45 *Designation of Record.*

Filed October 21, 1935.

* * * * * * *

The Clerk will please prepare the record on appeal in the above entitled cause and include therein the following:

1. Memorandum: Bill of complaint, filed July 24, 1935.

2. Memorandum: Temporary restraining order. Bond Five Thousand Dollars ($5,000.00) July 25, 1935.

3. Motions of defendants to dismiss bill of complaint, filed July 31, 1935, in full. (But excluding memorandum of points and authorities.)

4. Memorandum: Amended bill of complaint filed August 1, 1935.

5. Memorandum: Order granting preliminary injunction, August 2, 1935.

6. Motion of defendants to dissolve preliminary injunction and to dismiss bill, filed September 20, 1935, in full. (But excluding memorandum of points and authorities.)

7. Second amended bill of complaint, filed October 14, 1935, in full, and fiat.

46 8. Final decree entered October 15, 1935, in full, including notation of appeal and order fixing cost bond on appeal.

9. Order of October 15, 1935, restoring preliminary injunction pending appeal and modifying same, in full.

10. Memorandum of deposit of Fifty Dollars ($50.00) in lieu of bond on appeal.
11. Assignment of errors.
12. This designation.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
*Attorneys for Plaintiff.*

The defendants have no additional designation.

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

47 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 46, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59071 in Equity, wherein Alabama Power Company, a corporation, is Plaintiff, and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of October, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
*Clerk.*

By CHAS. B. COFLIN,
*Assistant Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 6580. Alabama Power Company, a corporation, Appellant, vs. Harold L. Ickes, Administrator, et al. United States Court of Appeals for the District of Columbia. Filed Oct. 24, 1935. Henry W. Hodges, Clerk.

(7019-C)

102 Endorsed on Cover: United States Court of Appeals for the District of Columbia. Filed Dec. 17 1935. Henry W Hodges, Clerk.

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103 In the United States Court of Appeals for the District of Columbia

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No. 6580

ALABAMA POWER COMPANY, *Appellant*

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, *et al.*, *Appellees*

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*Motion*

Now come the appellees and respectfuly show to this Court:

I

That the decree, entered herein in the Supreme Court of the District of Columbia, on October 15, 1935, and from which the present appeal was taken, dismissed the bill of complaint on the ground of insufficiency and on other similar grounds. The suit was brought to enjoin the defendants from advancing Public Works Administration funds to the municipalities named in the bill of complaint for the purpose of constructing an electric power plant.

For several weeks last past the municipalities have been negotiating with the Public Works Administration, and said negotiations culminated in agreements abrogat-
104 ing the existing contracts between the parties and in the execution of new contracts, the terms of which are vitally and substantially different than is alleged in the bill of complaint. Thus the pleadings do not now represent an actually existing controversy between the parties, and it would be futile and useless to continue the litigation on the basis of them. The facts relative to the execution of said contracts are as follows:

II

On or about December 28, 1934, the Federal Emergency Administrator of Public Works and the City of Sheffield executed a loan and grant agreement, a copy of which is hereto attached and made a part hereof and marked Exhibit 1, which was in existence at the time when the bill was filed by the appellant. After the decree was entered in this cause in the Supreme Court of the District of Columbia, and while this case was pending on appeal, on December 2, 1935, the Administrator and the said City of Sheffield entered into an agreement terminating the former agreement and all other understandings and agreements, if any, between the parties to that agreement relating to subject matter thereof. A true copy of said terminating agreement is attached hereto, made a part hereof, and marked Exhibit 2. Subsequently, on December 4, 1935, there was delivered to said city by the Administrator an offer to purchase
105 certain of the bonds of said city and to make a grant to said city of Sheffield, a true copy of which offer is also attached hereto, made a part hereof, and marked Exhibit 3.

On or about December 28, 1934, the Administrator and the city of Tuscumbia executed a loan and grant agreement, a copy of which is hereto attached, made a part hereof, and marked Exhibit 4, which was in existence at the time when the bill was filed by the appellant. After the decree was entered on December 15, 1935, in this cause in the Supreme Court of the District of Columbia, and while this case was pending on appeal, on or about December 2, 1935, the Administrator and the said City of Tuscumbia entered into an agreement terminating the former agreement, and all other understandings and agreements, if any, between the parties to that agreement relating to subject matter thereof. A true copy of said terminating agreement is attached hereto, made a part hereof, and marked Exhibit 5. Subsequently, on December 4, 1935, there was delivered to said city by the Administrator an offer to purchase certain of the bonds of said city and to make a grant to said city of Tuscumbia, a true copy of which offer is also attached hereto, made a part hereof, and marked Exhibit 6.

On or about December 6, 1934, the Administrator and the city of Decatur executed a loan and grant agreement, a copy

of which is hereto attached, made a part hereof, and
106 marked "Exhibit 7", which was in existence at the time when the bill was filed by the appellant. After the decree was entered on December 15, 1935, in this cause in the Supreme Court of the District of Columbia, and while this case was pending on appeal, on or about December 2, 1935, the Administrator and the said City of Decatur, entered into an agreement terminating the former agreement, and all other understandings and agreements, if any, between the parties to that agreement relating to subject matter thereof. A true copy of said terminating agreement is attached hereto, made a part hereof, and marked "Exhibit 8." Subsequently, on December 4, 1935, there was delivered to said city by the Administrator, an offer to purchase certain of the bonds of said city and to make a grant to said city of Decatur, a true copy of which offer is also attached hereto, made a part hereof, and marked "Exhibit 9."

On or about December 28, 1934, the Administrator and the city of Florence executed a loan and grant agreement, a copy of which is hereto attached, made a part hereof, and marked "Exhibit 10", which was in existence at the time when the bill was filed by the appellant. After the decree was entered on October 15, 1935, in this cause in the Supreme Court of the District of Columbia, and while this case was pending on appeal, on or about December 2, 1935, the Administrator and the said City of Florence, entered into an agreement terminating the former agreement, and all other understandings and agreements, if any, be-
107 tween the parties to that agreement relating to subject matter thereof. A true copy of said terminating agreement is attached hereto, made a part hereof, and marked "Exhibit 11." Subsequently, on December 4, 1935, there was delivered to said city by the Administrator an offer to purchase certain of the bonds of said city and to make a grant to said City of Florence, a true copy of which offer is also attached hereto, made a part hereof, and marked "Exhibit 12."

Wherefore, and for the reasons set forth in the annexed memorandum, the appellees move that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts above

set forth and for a trial or other disposition of the cause on such amended pleadings

JAMES W. MORRIS,
*Assistant Attorney General.*

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

JOHN W. SCOTT,
*Special Assistant to the Attorney General.*

JEROME N. FRANK,
*Counsel for the Federal Emergency Administration of Public Works.*

108

## EXHIBIT 1

Loan and Grant Agreement Dated as of Dec. 28, 1934, Between the City of Sheffield, Alabama (Herein Called the "Borrower") and the United States of America (Herein Called the "Government")

Docket No. 3124

### Part One

1. *Purpose of Agreement.*—Subject to the terms and conditions of this Loan and Grant Agreement (herein called the "Agreement"), the Government will, by loan and grant not exceeding in the aggregate the sum of $230,000, aid the Borrower in financing a project (herein called the "Project") consisting of the construction of an electric transmission line and distribution system, and other necessary appurtenances thereto, all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 3124, Title II of the National Industrial Recovery Act (herein called the "Act"), and the Constitution and Statutes of the State of Alabama, including particularly:

Act No. 107, General and Local Acts of Alabama, Extra Session, 1933, page 100.

2. *Description of Bonds.*—(a) *Designation.*—Electric System Bond.

(b) *Authorized Principal Amount.*—$187,000.

(c) *Type.*—Special obligation, serial, coupon bonds.

(d) *Registration.*—Registerable at the option of the holder as to principal only.

(e) *Date.*—June 1, 1934.

(f) *Interest.*—At the rate of 4 per cent per annum, payable December 1, 1934, and semiannually thereafter on June 1, and December 1 in each year.

(g) *Maturities.*—Payable on June 1, in years and
109 amounts as follows:

| Year: | Amount | Year: | Amount |
|---|---|---|---|
| 1937 | $10,000 | 1946 | $12,000 |
| 1938 | 10,000 | 1947 | 12,000 |
| 1939 | 10,000 | 1948 | 12,000 |
| 1940 | 10,000 | 1949 | 12,000 |
| 1941 | 10,000 | 1950 | 12,000 |
| 1942 | 10,000 | 1951 | 12,000 |
| 1943 | 10,000 | 1952 | 12,000 |
| 1944 | 10,000 | 1953 | 12,000 |
| 1945 | 11,000 | | |

(h) *Security.*—Special obligations of the Borrower, payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

(i) *Place and Medium of Payment.*—Payable at the office of the City Treasurer, Sheffield, Alabama, or, at the option of the holder, at a bank or trust company in Borough of Manhattan, City and State of New York, in any coin or currency which, on the respective dates of payment of the principal of and interest on the Bonds, is legal tender for public and private debts.

(j) *Denomination.*—$1,000.

Other provisions may be substituted for the provisions of subparagraphs (a), (b), (c), (d), (e), (f), (g), (i), and (j) of this Paragraph by the Borrower if the consent of the Federal Emergency Administrator of Public Works (herein called the "Administrator") to such substitution is obtained.

3. *Amount and Method of Making Grant.*—The Government will make and the Borrower will accept, whether or not any or all of the Bonds be sold to a purchaser or purchasers other than the Government, a Grant in an amount equal to thirty per centum of the cost of the labor and materials employed upon the Project. Wherever the expres-

sion "cost of labor and materials" is used in this Agreement, such expression shall mean such cost as determined by the Administrator, and his determination thereof shall be final. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds and/or interest coupons; provided, however, that if all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money.

4. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.*—If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.*—If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $230,000, being the cost estimated at the time when the Application was approved by the Government, or that the Borrower will be able to obtain, through additional borrowing or otherwise, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall believe to be necessary to complete the Project;

(c) *Compliance.*—If the Borrower shall not have complied, to the satisfaction of the Administrator, with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.*—If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the Project;

(e) *Representations.*—If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government

by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) *Tennessee Valley Authority Contract.*—If the Borrower shall not execute a valid contract, satisfactory to the Administrator, between the Borrower and the Tennessee Valley Authority, under the terms of which the Tennessee Valley Authority will supply electrical energy to the Borrower, and will permit the Borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of and interest upon the Bonds;

(g) *Rate and Bond Ordinances.*—If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by the Project and the ordinance providing for the authorization, issuance, and sale of the Bonds, and the use of the revenue derived from the operation of the Project, shall not be satisfactory in form and substance to the Administrator.

5. *Bond Counsel and Bond Proceedings.*—When this Agreement has been executed the Borrower (unless it has already done so) shall promptly:

(a) Retain municipal bond counsel satisfactory to the Administrator to assist the Borrower in the proceedings relative to the authorization, issuance, and sale of the Bonds and to give legal opinions on such matters relative thereto as may be requested by the Administrator; and

(b) Take all the proceedings necessary for the authorization and issuance of the Bonds.

6. *Bond and Grant Requisitions.*—From time to time after the execution of this Agreement, the Borrower shall file a requisition with the Government requesting the
112 Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "Requisition").

7. *Bond Purchases.*—If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in

form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at the Birmingham Branch of the Federal Reserve Bank of Atlanta, Birmingham, Alabama (herein called the "Reserve Bank"), or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, and all unmatured interest coupons appertaining thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the project.

8. *Grant by Payment of Money.*—If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at the Reserve Bank or at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) Twenty-five per centum of the cost of the labor and materials shown in the Requisition to have been em-
113 ployed upon the Project if the Requisition shows that the Project has not been completed; or

(b) Thirty per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined.

Provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between $230,000 and the aggregate principal amount of the Bonds purchased by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds and/or interest coupons rather than by payment of money if the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

9. *Grant by Cancellation of Bonds.*—If the Borrower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and/or interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between thirty per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

10. *Grant Advances.*—At any time after the execution of this Agreement the Government may, upon request of the Borrower, if, in the judgment of the Administrator, the circumstances warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of thirty per centum of the cost of the labor and materials to be employed upon the Project, as estimated
114 by the Administrator.

11. *Deposit of Bond Proceeds and Grant; Bond Fund; Special Accounts.*—The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 9, Part One, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 8, Part One, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "Special Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator. Provided, however, that interest on said Bonds accru-

ing prior to complete construction of the Project shall be paid from the proceeds of said Bonds to the extent such interest is not available from funds received as accrued interest, and, provision shall be made that, upon the delivery of said Bonds and the receipt of the proceeds, a sufficient sum, including the accrued interest received, shall be withdrawn from the proceeds and placed in said Bond Fund to pay said interest.

12. *Disbursement of Monies in Special Accounts and Bond Fund.*—The Borrower shall expend the monies in a Special Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and approved by the Administrator. Any monies remaining unexpended in any Special Account after the completion of the Project which are not required to meet unpaid obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

13. *Other Financial Aid from the Government.*—If the Borrower shall receive any funds directly or indirectly from the Government or any agency or instrumentality thereof, other than the Loan or Grant, to aid in financing the construction of the Project, to the extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

## Part Two

*In consideration of the grant, the borrower covenants that:*

1. *Construction Work.*—All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the Act. The following rules and regu-

lations as set out in Bulletin No. 2, revised on March 3, 1934, entitled, "P. W. A. REQUIREMENTS as to BIDS, CONTRACTOR'S BONDS, AND CONTRACT, WAGE, AND LABOR PROVISIONS AND GENERAL INSTRUCTIONS as to APPLICATIONS AND LOANS AND GRANTS", shall be incorporated verbatim (except that in all places where the term "Borrower" is used the name of the Borrower shall be inserted) in all con-
116 struction contracts for work on the Project:

"1. (a) *Convict labor.*—No convict labor shall be employed on the Project and no materials manufactured or produced by convict labor shall be used on the Project.

"(b) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government Engineer, no individual directly employed on the Project shall be permitted to work more than eight hours in any one day nor more than thirty hours in any one week: Provided, that this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any one week to be made up in the succeeding twenty days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. Such wages shall in no event be less than the minimum hourly wage rates for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done vis.:

| | |
|---|---|
| Skilled labor | $1.00 |
| Unskilled labor | .40 |

"(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: Provided, That such agreed wage rates shall be effective for the period of this contract, but not to exceed twelve months from the date of the contract.

"(c) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve
117 skilled journeyman mechanics and who are not to be termed as 'unskilled laborers.'

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the Project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the Act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government Engineer, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, however, that this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical aid insurance, in such amounts as are authorized by the laws of the State of Alabama to be paid by employees, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of the State of Alabama, should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Engineer In-
118 spector shall be furnished with a sworn statement thereof on demand.

"(g) The Board of Labor Review (herein called the the "Board") shall hear all labor issues arising under the operation of this contract and such issues as may result

from fundamental changes in economic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to change by the Administrator on recommendation of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in Paragraph 2 (a), (b), and (c) hereof) all contracts for work on the Project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased by an amount equal to any such decreased cost.

"(i) Engineers, architects, and other professional and subprofessional employees engaged on the Project shall receive the prevailing local rates for the various types of service to be rendered, except that in no case shall they receive less than the hourly rates set for the highest paid class of skilled labor directly employed on the Project.

"3. (a) *Labor preferences.*—Preferences shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the City of Sheffield, and/or Colbert County, Alabama, and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State of Alabama: *Provided,* That these preferences shall apply only where such labor
119 is available and qualified to perform the work to which the employment relates.

"(b) *Employment services.*—To the fullest extent possible, labor required for the Project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however,* That union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through

recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals which are authorized to furnish such labor residing in the locality within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the labor preferences provided in section (a) of this Paragraph 3 shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection have no other available employment.

"(c) *Compliance with Title I of the Act.*—The following section 7 (a) (1) and 7 (a) (2) of Title I of the Act shall be observed:

"'(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection: (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing';

"4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economic and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. *Compensation Insurance.*—Every employer of labor shall provide, if permitted by the laws of the State of Alabama, adequate workmen's compensation insurance for all labor employed by him on the Project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the ben-

efit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government Engineer shall be given. Where it is not permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided by which the employees may, by paying the entire amount of the premium, derive a similar protection.

"6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the Project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. *Withholding payment.*—Under all construction contracts, the Borrower may withhold from the contractor so much of accrued payments as may be necessary to
121 pay to laborers or mechanics, employed on the work, the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

"8. *Accident prevention.*—Reasonable precaution shall at all times be exercised for the safety of employees on the work, and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment, and other physical hazards, shall be guarded in accordance with the safety provisions of the "Manual of Accident Prevention in Construction" of the Associated General Contractors of America, unless and to the extent that such provisions are incompatible with Federal, State, or municipal laws or regulations.

"9. (a) *N. R. A. materials.*—So far as articles, materials, and supplies produced in the United States are concerned, only articles, materials, and supplies produced under codes of fair competition under Title I of the Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the Government Engineer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

"(b) *Local preference.*—So far as practicable, and subject to the provisions of section (a) of this Paragraph 9, preference shall also be given to the use of locally produced materials if such does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the Government Engineer; but there shall be no requirement providing price differentials for, or restricting the use of materials to, those produced within the Nation or State.

"10. (a) *Inspection of records.*—The Administrator, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access
122 to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator, through his authorized agents, the names and addresses of all personnel, and such schedules of the costs of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Administrator, through his authorized agents, may require. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the Engineer Inspector such reasonable facilities as he may request. In case of dispute the Government Engineer shall determine the reasonableness of the request.

"11. *Reports.*—Every employer of labor on the Project shall report within five days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the Project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to be furnished to the Government Engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to the Borrower, to the Government Engineer, and to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government Engi-
123 neer, such services shall be paid for in full at least once a month and such materials, tools, implements, and appliances shall be paid for at least once a month to the extent of 90% of the cost thereof to the contractor, and the remaining 10% shall be paid thirty days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. *Signs.*—Signs bearing the legend 'PUBLIC WORKS PROJECT No. 3214' shall be erected in appropriate places at the site of the Project.

"14. All reasonable rules and regulations which the Administrator may prescribe toward the effectuation of the matters covered by Paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

"15. *Subcontractors.*—(a) Appropriate provisions shall be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such contractors, particularly Paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcontractor who has not signed U. S. Government Form No. P. W. A. 61, revised March —, 1934.

"16. *Termination for breach.*—In the event that any of the provisions of Paragraphs 1 to 15 inclusive of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, the Borrower may, subject to the approval of the Government Engineer, and upon request of the Administrator shall terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within ten days after the serving of such notice, such violation shall cease, the contract shall, upon the expiration of said ten days, cease and terminate. In the event of any such termination the Borrower may take over the work and prosecute the same to completion or otherwise for the account and at the expense of the

contractor and/or subcontractor, and the contractor and his sureties shall be liable to the Borrower for any excess cost occasioned the Borrower in the event of any such termination, and the Borrower may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work, and necessary therefor. This clause shall not be construed to prevent the termination for other causes provided in the construction contract.

"17. *Definition.*—The term 'Administrator' as used herein refers to the Federal Emergency Administrator of Public Works. The term 'Act' as used herein refers to the National Industrial Recovery Act. The term 'Government Engineer' as used herein shall mean the State Engineer (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this Agreement by the Administrator. The term 'Engineer Inspector' as used refers to State Engineer Inspector, Resident and Assistant Resident Engineer Inspectors, and Supervising Engineers, appointed by the Administrator. The term 'Materials' as used herein includes, in addition to materials incorporated in the Project or used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work."

2. *Restriction as to Contractors.*—The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

3. *Bonds and Insurance.*—Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, of Materialmen, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Government Engineer.

4. *Force Labor.*—If prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement notwithstanding, to apply to the Administrator for permission to do all or any part of the Project by day labor, upon such conditions as the Administrator may impose.

PART THREE

1. *Construction of Project.*—Not later than upon the receipt by it of the first Bond payment, the Borrower will promptly commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, such engineering supervision and inspection as the Administrator or his representatives may require, and plans, drawings, specifications, and construction contracts which shall be satisfactory to the Administrator. Except with the prior written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage or any conditional sale or title-retention agreement.

2. *Information.*—During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction cost and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower and the project as the Administrator or any such purchaser may at any time reasonably require.

3. *Representations and Warranties.*—The Bor-
126 rower represents and warrants as follows:

(a) *Litigation.*—No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the construction and operation of the Project, or the financial condition of the Borrower;

(b) *Financial Condition.*—The character of the assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of its assets or in its financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(c) *Fees and Commissions.*—No fee or commission has been or will be paid by the Borrower or any of its officers,

employees, agents, or representatives, and no agreement to pay a fee or commission has been or will be entered into by or on behalf of the Borrower, or any of its officers, employees, agents, or representatives, in order to secure the loan or Grant hereunder;

(d) *Affirmation.*—Every statement contained in this Agreement, in the Borrower's Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government by or behalf of the Borrower is correct and complete, and no relevant fact materially affecting the Bonds, the Grant, or the Project, or the obligations of the Borrower under this Agreement has been or will be omitted therefrom.

4. *Sale of Bonds by the Government.*—The Borrower will take all such steps as the Government may reasonably request to aid in the sale by the Government of any or all of the Bonds. Upon request, the Borrower will furnish to the Government or to any purchaser from the Government of 25 per centum of the Bonds, information for the preparation of a bond circular in customary form, signed by 127 the proper official of the Borrower, containing such data as the Government or such purchaser may reasonably request concerning the Borrower and the Project.

5. *Expenses.*—The Government shall be under no obligation to pay any costs, charges, and expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement, including, without limiting the generality of the foregoing, the cost of preparing, executing, or delivering the Bonds or obtaining all legal opinions requested by the Administrator.

6. *Waiver.*—Any provision of this Agreement may be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement, if, in the opinion of the administrator, which shall be conclusive, such waiver or amendment does not substantially vary the terms of this Agreement.

7. *Interest of Member of Congress.*—No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise therefrom.

8. *Validation.*—The Borrower hereby covenants that it will institute, prosecute and carry to completion insofar as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities, and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate or advisable. The Borrower further covenants
that it will procure and furnish to the Government,
128 as a condition precedent to the Government's obligations hereunder, a letter from the Governor of the State of Alabama stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities or irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

9. *Miscellaneous.*—Subject to the limitations herein contained, this Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement shall be governed by and construed in accordance with the laws of the State of Alabama.

10. *Naming of Project.*—The Project shall not be named except with the written consent of the Administrator.

11. *Undue Delay by the Borrower.*—If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties of the obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

12. *Nature of Liability.*—It is expressly understood and agreed that this Agreement does not constitute an indebtedness of the Borrower within the meaning of any provision or limitation of the Constitution of the State of Alabama, and it is hereby made a condition of this Agreement that

the covenants, agreements, representations, and warranties herein contained do not and shall never impose a pecuniary liability upon the Borrower or charge against its general credit.

13. *Construction of Agreement.*—If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the
129 validity and effectiveness of any other provision of this Agreement or the right or obligations of the parties hereto, provided, in the opinion of the Administrator, the Agreement does not then violate the terms of the Act.

IN WITNESS WHEREOF, the CITY OF SHEFFIELD, ALABAMA, and the UNITED STATES OF AMERICA have respectively caused this Agreement to be duly executed as of the day and year first above written.

CITY OF SHEFFIELD, ALABAMA,
By W. H. RICHESON,
*Chairman of City Commission.*

UNITED STATES OF AMERICA,
By HAROLD L. ICKES,
*Federal Emergency Administrator of Public Works.*

[SEAL]
Attest:
PETER SCHAUT,
*City Clerk.*

130 EXHIBIT 2

Agreement Terminating the Loan and Grant Agreement Between the City of Sheffield (County of Colbert, Alabama) and the United States of America

P. W. A. Docket No. 3124

Agreement Dated as of December 2, 1935, Terminating the Loan and Grant Agreement Dated as of December 28, 1934, the Amendatory Loan Agreement Dated as of April 6, 1935, and the Amendatory Loan Agreement Dated as of June 6, 1935, Between the City of Sheffield, Colbert County, Alabama (Herein Called the "City") and the United States of America (Herein Called the "Government")

WHEREAS a Loan and Grant Agreement was entered into by and between the City and the Government dated as of December 28, 1934, and

WHEREAS said Loan and Grant Agreement was amended by an Amendatory Loan Agreement by and between the City and the Government dated as of April 6, 1935, and

WHEREAS said Loan and Grant Agreement was further amended by an Amendatory Loan Agreement by and between the City and the Government dated as of June 6, 1935, and

WHEREAS it is to the mutual advantage of the City and the Government to terminate said Loan and Grant Agreement and said Amendatory Loan Agreements,

NOW, THEREFORE, IT IS HEREBY AGREED by and between the City and the Government that said Loan and Grant Agreement dated as of December 28, 1934, said Amendatory Loan Agreement dated as of April 6, 1935, and said Amendatory Loan Agreement dated as of June 6, 1935, be and the
131 same hereby are terminated.

CITY OF SHEFFIELD,
By HOYT GREEN,
*Pres. of City Commission.*

UNITED STATES OF AMERICA.
*Federal Emergency Administrator*
*of Public Works.*

(Sgd.) HORATIO B. HACKETT,

Exhibit 3 referred to in the foregoing motion is not printed at this point because it appears as Exhibit C to the defendants' answer to the third amended bill of complaint at p. 297 infra.

141 EXHIBIT 4

Loan and Grant Agreement Dated as of Dec. 28, 1934, Between the City of Tuscumbia, Alabama (Herein Called the "Borrower"), and the United States of America (Herein Called the "Government")

Docket No. 3125

Part One

1. *Purpose of Agreement.*—Subject to the terms and conditions of this Loan and Grant Agreement (herein called the "Agreement"), the Government will, by loan and grant not exceeding in the aggregate the sum of $130,000, aid the Borrower in financing a project (herein called the "Project") consisting of the construction of an electric transmission line and distribution system, and other necessary appurtenances thereto, all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 3125, Title II of the National Industrial Recovery Act (herein called the "Act"), and the Constitution and Statutes of the State of Alabama, including particularly:

Act No. 107, General and Local Acts of Alabama, Extra Session 1933, page 100.

2. *Description of Bonds*—(a) *Designation.*—Electric System Bond.

(b) *Authorized Principal Amount.*—$105,000.

(c) *Type.*—Special obligation, serial, coupon bonds.

(d) *Registration.*—Registerable at the option of the holder as to principal only.

(e) *Date.*—June 1, 1934.

(f) *Interest.*—At the rate of 4 percent per annum, payable December 1, 1934, and semiannually thereafter on June 1 and December 1 in each year.

(g) *Maturities.*—Payable on June 1, in years and
142 amounts as follows:

| Year: | *Amount* | Year: | *Amount* |
|---|---|---|---|
| 1937 | $4,000 | 1946 | $6,000 |
| 1938 | 4,000 | 1947 | 6,000 |
| 1939 | 5,000 | 1948 | 6,000 |
| 1940 | 5,000 | 1949 | 7,000 |
| 1941 | 5,000 | 1950 | 7,000 |
| 1942 | 5,000 | 1951 | 7,000 |
| 1943 | 5,000 | 1952 | 7,000 |
| 1944 | 5,000 | 1953 | 8,000 |
| 1945 | 5,000 | 1954 | 8,000 |

(h) *Security.*—Special obligations of the Borrower, payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

(i) *Place and Medium of Payment.*—Payable at the office of the City Treasurer, Tuscumbia, Alabama, or, at the option of the holder, at a bank or trust company in Borough of Manhattan, City and State of New York, in any coin or currency which, on the respective dates of payment of the principal of and interest on the Bonds, is legal tender for public and private debts.

(j) *Denomination.*—$1,000.

Other provisions may be substituted for the provisions of subparagraphs (a), (b), (c), (d), (e), (f), (g), (i), and (j) of this Paragraph by the Borrower if the consent of the Federal Emergency Administrator of Public Works (herein called the "Administrator") to such substitution is obtained.

3. *Amount and Method of Making Grant.*—The Government will make and the Borrower will accept, whether or not any or all of the Bonds shall be sold to a purchaser or purchasers other than the Government, a Grant in an amount equal to thirty per centum of the cost of the labor and materials employed upon the Project. Wherever the expression "Cost of labor and materials" is used in this Agreement, such expression shall mean such cost as determined by the Administrator, and his determination thereof shall be final. The Government will make part of the Grant by payment of money and the remainder of the
143 Grant by cancellation of Bonds and/or interest cou-

pons; provided, however, that if all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money.

4. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.*—If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.*—If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $130,000, being the cost estimated at the time when the Application was approved by the Government, or that the Borrower will be able to obtain, through additional borrowing or otherwise, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall believe to be necessary to complete the Project;

(c) *Compliance.*—If the Borrower shall not have complied, to the satisfaction of the Administrator, with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.*—If the administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the Project;

(e) *Representations.*—If any representation made
144 by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) *Tennessee Valley Authority Contract.*—If the Borrower shall not execute a valid contract, satisfactory to the Administrator, between the Borrower and the Tennessee

Valley Authority, under the terms of which the Tennessee Valley Authority will supply electrical energy to the Borrower, and will permit the Borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of and interest upon the Bonds;

(g) *Rate and Bond Ordinances.*—If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by the Project and the ordinance providing for the authorization, issuance and sale of the Bonds, and the use of the revenues derived from the operation of the Project, shall not be satisfactory in form and substance to the Administrator.

5. *Bond Counsel and Bond Proceedings.*—When this Agreement has been executed the Borrower (unless it has already done so) shall promptly:

(a) Retain municipal bond counsel satisfactory to the Administrator to assist the Borrower in the Proceedings relative to the authorization, issuance, and sale of the Bonds and to give legal opinions on such matters relative thereto as may be requested by the Administrator; and

(b) Take all the proceedings necessary for the authorization and issuance of the Bonds.

6. *Bond and Grant Requisitions.*—From time to time after the execution of this Agreement, the Borrower shall
145 file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "Requisition").

7. *Bond Purchases.*—If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment

for such Bonds shall be made at the Birmingham Branch of the Federal Reserve Bank of Atlanta, Birmingham, Alabama (herein called the "Reserve Bank"), or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, and all unmatured interest coupons appertaining thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the project.

8. *Grant by Payment of Money.*—If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at the Reserve Bank or at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) Twenty-five per centum of the cost of the labor and materials shown in the Requisition to have been em-
146 ployed upon the Project if the Requisition shows that the Project has not been completed, or

(b) Thirty per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined;

Provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between $130,000 and the aggregate principal amount of the Bonds purchased by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds and/or interest coupons rather than by payment of money if the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

9. *Grant by Cancellation of Bonds.*—If the Borrower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will

cancel such Bonds and/or interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between thirty per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

10. *Grant Advances.*—At any time after the execution of this Agreement the Government may, upon request of the Borrower, if, in the judgment of the Administrator, the circumstances warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of thirty per centum of the cost of the labor and materials to be employed upon the Project, as estimated
147 by the Administrator.

11. *Deposit of Bond Proceeds and Grant; Bond Fund; Special Accounts.*—The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 9, PART ONE, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 8, PART ONE, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "Special Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator. Provided, however, that interest on said Bonds accruing prior to complete construction of the Project shall be paid from the proceeds of said Bonds to the extent such interest is not available from funds received as ac-

crued interest, and, provision shall be made that, upon the delivery of said Bonds and the receipt of the proceeds, a sufficient sum, including the accrued interest received, shall be withdrawn from the proceeds and placed in said Bond Fund to pay said interest.

12. *Disbursement of Monies in Special Accounts and Bond Fund.*—The Borrower shall expend the monies in a Special Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and approved by the Administrator. Any monies remaining unexpended in any Special Account after the completion of the Project which are not required to meet
148 unpaid obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

13. *Other Financial Aid from the Government.*—If the Borrower shall receive any funds directly or indirectly from the Government or any agency or instrumentality thereof, other than the Loan or Grant, to aid in financing the construction of the Project, to the extent that such funds are so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

Part Two

*In consideration of the grant, the borrower covenants that:*

1. *Construction Work.*—All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the Administration of the Act. The following rules and regulations as set out in Bulletin No. 2, revised on March 3, 1934, entitled, "P. W. A. Requirements as to Bids, Contractor's Bonds, and Contract, Wage, and Labor Provisions, and General Instructions as to Applications and Loans and

GRANTS", shall be incorporated verbatim (except that in all places where the term "Borrower" is used the name of the Borrower shall be inserted) in all construction contracts for work on the Project:

"1. (a) *Convict Labor.*--No convict labor shall be
149 employed on the Project and no materials manufactured or produced by convict labor shall be used on the Project.

"(b) *Thirty-hour Week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government Engineer, no individual directly employed on the Project shall be permitted to work more than eight hours in any one day nor more than thirty hours in any one week: Provided, that this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any one week to be made up in the succeeding twenty days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. Such wages shall in no event be less than the minimum hourly wage rate for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done, viz:

| | |
|---|---|
| Skilled labor | $1.00 |
| Unskilled labor | .40 |

"(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed twelve months from the date of the contract.

"(c) The above-designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve

150 skilled journeymen mechanics and who are not to be termed as 'unskilled laborers.'

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the Project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the Act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government Engineer, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: *Provided, however,* That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical aid insurance, in such amounts as are authorized by the laws of the State of Alabama to be paid by employees, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of the State of Alabama, should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Engineer Inspector shall be furnished with a sworn statement thereof on demand.

"(g) The Board of Labor Review (herein called
151 the 'Board') shall hear all labor issues arising under the operation of this contract and such issues as may result from fundamental changes in economic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to charge by the Administrator on recommendation of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in Paragraph 2 (a), (b), and (c) hereof) all contracts for work on the Project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased by an amount equal to any such decreased cost.

"(i) Engineers, architects, and other professional and subprofessional employees engaged on the Project shall receive the prevailing local rates for the various types of service to be rendered, except that in no case shall they receive less than the hourly rates set for the highest paid class of skilled labor directly employed on the Project.

"3. (a) *Labor Preferences.*—Preferences shall be given where they are qualified, the ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the City of Tuscumbia, and/or Colbert County, Alabama, and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State of Alabama: *Provided,* That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

"(b) *Employment Services.*—To the fullest extent
152 possible, labor required for the Project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however,* that union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, how-

ever, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals, which are authorized to furnish such labor residing in the locality, within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the Labor preferences provided in section (a) of this Paragraph 3, shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

"(c) *Compliance with Title I of the Act.*—The following section 7 (a) (1) and 7 (a) (2) of Title I of the Act shall be observed:

"'(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection: (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing,
153 or assisting a labor organization of his own choosing.'

"4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economic and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. *Compensation Insurance.*—Every employer of labor shall provide, if permitted by the laws of the State of Alabama, adequate workmen's compensation insurance for all labor employed by him on the Project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the bene-

fit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government Engineer shall be given. Where it is not permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided, by which the employees may, by paying the entire amount of the premium, derive a similar protection.

"6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the Project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. *Withholding payment.*—Under all construction contracts, the Borrower may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work, the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

"8. *Accident prevention.*—Reasonable precaution
154 shall at all times be exercised for the safety of employees on the work and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment and other physical hazards shall be guarded in accordance with the safety provisions of the 'Manual of Accident Prevention in Construction' of the Associated General Contractors of America, unless and to the extent that such provisions are incompatible with Federal, State, or municipal laws or regulations.

"9. (a) *N. R. A. materials.*—So far as articles, materials, and supplies produced in the United States are concerned, only articles, materials, and supplies produced under codes of fair competition under Title I of the Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the Government Engineer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

"(b) *Local preference.*—So far as practicable, and subject to the provisions of section (a) of this Paragraph 9, preference shall also be given to the use of locally produced materials if such does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the Government Engineer; but there shall be no requirement providing price differentials for, or restricting the use of materials to, those produced within the Nation or State.

"10. (a) *Inspection of records.*—The Administor, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator
155 through his authorized agents, the names and addresses of all personnel, and such schedules of the costs of labor, costs, and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Administrator, through his authorized agents, may require. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the Engineer Inspector such reasonable facilities as he may request. In case of dispute the Government Engineer shall determine the reasonableness of the request.

"11. *Reports.*—Every employer of labor on the Project shall report within five days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the Project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to the furnished to the Government Engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to the Borrower, to the Government Engineer, and the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government Engineer, such services shall be paid for in full at least once a month and such materials, tools, implements, and appli-
ances shall be paid for at least once a month to the
156 extent of 90% of the cost thereof to the contractor, and the remaining 10% shall be paid thirty days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. *Signs.*—Signs bearing the legend 'PUBLIC WORKS PROJECT No. 3125' shall be erected in appropriate places at the site of the Project.

"14. All reasonable rules and regulations which the Administrator may prescribe toward the effectuation of the matters covered by Paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

"15. *Subcontractors.*—(a) Appropriate provisions shall be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such contractors, particularly Paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcontractor who has not signed U. S. Government Form No, P. W. A. 61, revised March 1934.

"16. *Termination for breach.*—In the event that any of the provisions of Paragraphs 1 to 15, inclusive, of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, the Borrower may, subject to the approval of the Government Engineer, and upon request of the Administrator shall, terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within ten days after the serving of such notice, such violation shall cease, the contract shall, upon the expiration of said ten days, cease and terminate. In the event of any such termination the Borrower may take over the work and prosecute the same

to completion or otherwise for the account and at the expense of the contractor and/or subcontractor, and the contractor and his sureties shall be liable to the Borrower for any excess cost occasioned the Borrower in the event of any such termination, and the Borrower may take
157 possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor. This clause shall not be construted to prevent the termination for other causes provided in the construction contract.

"17. *Definition.*—The term 'Administrator' as used herein refers to the Federal Emergency Administrator of Public Works. The term 'Act' as used herein refers to the National Industrial Recovery Act. The term 'Government Engineer' as used herein shall mean the State Engineer (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this Agreement by the Administrator. The term 'Engineer Inspector' as used refers to State Engineer Inspector, Resident and Assistant Resident Engineer Inspectors, and Supervising Engineers, appointed by the Administrator. The term 'materials' as used herein includes, in addition to materials incorporated in the Project or used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work."

2. *Restriction as to Contractors.*—The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

3. *Bonds and Insurance.*—Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, of Material-men, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Government Engineer.

4. *Force Labor.*—If prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement

notwithstanding, to apply to the Administrator for
158 permission to do all or any part of the Project by day labor upon such conditions as the Administrator may impose.

PART THREE.

1. *Construction of Project.*—Not later than upon the receipt by it of the first Bond payment, the Borrower will promptly commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, such engineering supervision and inspection as the Administrator or his representatives may require, and plans, drawings, specifications, and construction contracts which shall be satisfactory to the Administrator. Except with the prior written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage or any conditional sale or title retention agreement.

2. *Information.*—During the construction of the Project, the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction cost and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower and the project as the Administrator or any such purchaser may at any time reasonably require.

3. *Representations and Warranties.*—The Borrower represents and warrants as follows:

(a) *Litigation.*—No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the construction and operation of the Project, or the financial condition of the Borrower;

(b) *Financial Condition.*—The character of the
159 assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's

most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of its assets or in its financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(c) *Fees and Commissions.*—No fee or commission has been or will be paid by the Borrower or any of its officers, employees, agents, or representatives, and no agreement to pay a fee or commission has been or will be entered into by or on behalf of the Borrower, or any of its officers, employees, agents, or representatives, in order to secure the Loan or Grant hereunder;

(d) *Affirmation.*—Every statement contained in this Agreement, in the Borrower's Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government by or on behalf of the Borrower is correct and complete, and no relevant fact materially affecting the Bonds, the Grant, or the Project, or the obligations of the Borrower under this Agreement has been or will be omitted therefrom.

4. *Sale of Bonds by the Government.*—The Borrower will take all such steps as the Government may reasonably request to aid in the sale by the Government of any or all of the Bonds. Upon request, the Borrower will furnish to the Government or to any purchaser from the Government of 25 per centum of the Bonds, information for the preparation of a bond circular in customary form, signed by the proper official of the Borrower, containing such data as the Government or such purchaser may reasonably request concerning the Borrower and the Project.

5. *Expenses.*—The Government shall be under no obligation to pay any costs, charges, and expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement, including, without limiting the generality of the foregoing, the costs of preparing, executing or delivering the Bonds or obtaining all legal opinions requested by the Administrator.

6. *Waiver.*—Any provision of this Agreement may be waived or amended with the consent of the Borrower and

the written approval of the Administrator, without the execution of a new or supplemental agreement, if, in the opinion of the Administrator, which shall be conclusive, such waiver or amendment does not substantially vary the terms of this Agreement.

7. *Interest of Member of Congress.*—No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise therefrom.

8. *Validation.*—The Borrower hereby covenants that it will institute, prosecute and carry to completion in so far as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder, a letter from the Governor of the State of Alabama stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any de-
161 fects, illegalities, or irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

9. *Miscellaneous.*—Subject to the limitations herein contained, this Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement shall be governed by and be construed in accordance with the laws of the State of Alabama.

10. *Naming of Project.*—The Project shall not be named except with the written consent of the Administrator.

11. *Undue Delay by the Borrower.*—If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties of the obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

12. *Nature of Liability.*—It is expressly understood and agreed that this Agreement does not constitute an indebtedness of the Borrower within the meaning of any provision or limitation of the Constitution of the State of Alabama, and it is hereby made a condition of this Agreement that the covenants, agreements, representations, and warranties herein contained do not and shall never impose a pecuniary liability upon the Borrower or charge against its general credit.

13. *Construction of Agreement.*—If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity and effectiveness of any other provision of this Agreement or the right or obligations of the parties hereto, provided, in the opinion of the Administrator, the Agreement
162 does not then violate the terms of the Act.

IN WITNESS WHEREOF, the CITY OF TUSCUMBIA, ALABAMA, and the UNITED STATES OF AMERICA have respectively caused this Agreement to be duly executed as of the day and year first above written.

CITY OF TUSCUMBIA, ALABAMA,
By W. L. FARR, *Mayor.*

UNITED STATES OF AMERICA,
By HAROLD L. ICKES,
*Federal Emergency Administration of Public Works.*

[SEAL]
Attest:
J. L. HAY, *City Clerk.*

163

## EXHIBIT 5

Agreement Terminating the Loan and Grant Agreement Between the City of Tuscumbia (Colbert County, Alabama) and the United States of America

P. W. A. Docket No. 3125

Agreement Dated as of December 2, 1935, Terminating the Loan and Grant Agreement Dated as of December 28, 1934, and the Amendatory Loan Agreement Dated as of March 26, 1935, Between the City of Tuscumbia, Colbert County, Alabama (Herein Called the "City"), and the United States of America (Herein Called the "Government")

WHEREAS a Loan and Grant Agreement was entered into by and between the City and the Government dated as of December 28, 1934, and

WHEREAS said Loan and Grant Agreement was amended by an Amendatory Loan Agreement by and between the City and the Government dated as of March 26, 1935, and

WHEREAS it is to the mutual advantage of the City and the Government to terminate said Loan and Grant Agreement and said Amendatory Loan Agreement,

NOW, THEREFORE, IT IS HEREBY AGREED by and between the City and the Government that said Loan and Grant Agreement dated as of December 28, 1934, and said Amendatory Loan Agreement dated as of March 26, 1935, be and the same hereby are terminated.

CITY OF TUSCUMBIA, ALABAMA,

[SEAL]

By W. L. FARR, *Mayor.*

UNITED STATES OF AMERICA,
FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS.

(Sgd.) HORATIO B. HACKETT,
*Assistant Administrator.*

Attest:
I. L. Hays,
*City Clerk.*

Exhibit 6 referred to in the foregoing motion is not printed at this point because it appears as Exhibit D to the defendants' answer to the third amended bill of complaint at p. 315 infra.

173 EXHIBIT 7

Loan and Grant Agreement Dated as of December 6, 1934, Between the City of Decatur, Morgan County, Alabama (Herein Called the "Borrower") and the United States of America (Herein Called the "Government")

Docket No. 6587

Part One

1. *Purpose of Agreement.*—Subject to the terms and conditions of this Loan and Grant Agreement (herein called the "Agreement") the Government will, by loan and grant not exceeding in the aggregate the sum of $350,000 (herein called the "Allotment") aid the Borrower in financing a project (herein called the "Project") consisting of the construction of an electrical distribution system, including the low side of the substation and equipment, all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. *6587,* Title II, of the National Industrial Recovery Act (herein called the "Act") and the Constitution and Statutes of the State of Alabama (herein called the "State"), including particularly Act 107, General Acts of Alabama, approved April 6, 1933.

2. *Amount and Method of Making Loan.*—The Borrower will sell and the Government will buy, at the principal amount thereof plus accrued interest, $268,000 aggregate principal amount of the bonds described below (herein called the "Bonds") less such amount of the Bonds, if any, as the Borrower may sell to purchasers other than the Government.

(a) *Designation.*—Electric System Revenue Bond.

(b) *Authorized Amount.*—$268,000.

174 (c) *Type.*—Special obligation, serial, coupon bonds.

(d) *Registration.*—Registerable, at the option of the holder, as to principal only.

(e) *Date.*—September 1, 1934.

(f) *Interest.*—At the rate of 4 percent per annum payable on March 1, 1935, and semiannually thereafter on September 1 and March 1 in each year.

(g) *Maturities.*—Payable on September 1 in years and amounts as follows:

| Year: | *Amount* | Year: | *Amount* |
|---|---|---|---|
| 1937 | 9,000 | 1946 | $18,000 |
| 1938 | 9,000 | 1947 | 18,000 |
| 1939 | 9,000 | 1948 | 18,000 |
| 1940 | 9,000 | 1949 | 18,000 |
| 1941 | 12,000 | 1950 | 18,000 |
| 1942 | 12,000 | 1951 | 18,000 |
| 1943 | 14,000 | 1952 | 18,000 |
| 1944 | 14,000 | 1953 | 18,000 |
| 1945 | 18,000 | 1954 | 18,000 |

(h) *Security.*—Special obligations of the Borrower, payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

(i) *Place and Medium of Payment.*—Payable, in any coin or currency which, on the respective dates of payment of the principal of and interest on the Bonds, is legal tender for the payment of public and private debts, at the office of the City Treasurer of the City of Decatur, Decatur, Alabama, or, at the option of the holder, at a bank or trust company in Borough of Manhattan, City and State of New York.

(j) *Denomination.*—$1,000.

3. *Amount and Method of Making Grant.*—The Government will make and the Borrower will accept, whether or not any or all of the Bonds are sold to purchasers other than the Government, a grant (herein called the "Grant") in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project.
175 The determination by the Federal Emergency Administrator of Public Works (herein called the "Administrator") of the cost of the labor and materials employed upon the Project shall be conclusive. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds or interest coupons or both. If all of the Bonds are sold to purchasers other than the Government, the Government

will make the entire Grant by payment of money. In no event shall the Grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $100,000.

4. *Bond Proceedings.*—When the Agreement has been executed, the Borrower (unless it has already done so) shall promptly take all proceedings necessary for the authorization and issuance of the Bonds.

5. *Bond and Grant Requisitions.*—From time to time after the execution of this Agreement, the Borrower shall file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "Requisition").

6. *Bond Purchases.*—If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, in such amount as will provide, in the judgment of the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at a Federal Reserve Bank to be designated by the Administrator or at such other place or places as the Ad-
176 ministrator may designate, against delivery by the Borrower of such Bonds, having all unmatured interest coupons attached thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the Project.

7. *Grant by Payment of Money.*—If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor,

a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) 25 per centum of the cost of the labor and materials shown in the Requisition to have been employed upon the Project if the Requisition shows that the Project has not been completed, or

(b) 30 per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined.

Provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between the Allotment and the amount paid (not including the amount paid as accrued interest) for the Bonds taken up by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds or interest coupons or both rather than by payment of money if, in the judgment of the Administrator, the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

8. *Grant by Cancellation of Bonds.*—If the Borrower, within a reasonable time after the completion of the
177 Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between 30 per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

9. *Grant Advances.*—At any time after the execution of this Agreement the Government may, upon request of the Borrower, if in the judgment of the Administrator the circumstances so warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of 30 per centum of the cost of the labor and materials to be employed upon the Project, as estimated by the Administrator.

10. *Deposit of Bond Proceeds and Grant; Bond Fund; Construction Accounts.*—The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 8, PART ONE, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 7, PART ONE, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "Construc-
178 tion Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator.

11. *Disbursement of Monies in Construction Accounts and in Bond Fund.*—The Borrower shall expend the monies in a Construction Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and approved by the Administrator. Any monies remaining unexpended in any Construction Account after the completion of the Project which are not required to meet obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

12. *Other Financial Aid from the Government.*—If the Borrower shall receive any funds (other than those received under this Agreement) directly or indirectly from the Government, or any agency or instrumentality thereof, to aid in financing the construction of the Project, to the

extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

13. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.*—If, in the
179 judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.*—If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $350,000, or that the Borrower will be able to obtain, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall estimate to be necessary to complete the Project;

(c) *Compliance.*—If the Administrator shall not be satisfied that the Borrower has complied with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.*—If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the construction of the Project;

(e) *Representations.*—If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect.

(f) *Rate and Bond Ordinances.*—If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by

the Project and the Ordinance providing for the authorization, issuance, and sale of the Bonds, and the use of the revenues derived from the operation of the Project, shall not be satisfactory in form and substance to the Ad-
180 ministrator;

(g) *Tennessee Valley Authority Contract.*—If the Borrower shall not execute a valid contract satisfactory to the Administrator, between the Borrower and the Tennessee Valley Authority, under the terms of which the Tennessee Valley Authority will supply electrical energy to the Borrower, will permit the Borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of and interest upon the Bonds, and to provide a reserve for new construction and contingencies, and will specifically permit the Borrower to apply and keep in effect for the first year of operation of the Project, and longer if necessary for the foregoing purposes, a surcharge of 10% on the domestic, commercial, and industrial resale rate schedule of the Tennessee Valley Authority, and for at least the three succeeding years a surcharge of 10% on the commercial and industrial resale rate schedule of the Tennessee Valley Authority.

14. *Accounts and Statements.*—So long as any of the Bonds are held by the Government, the Borrower will furnish to the Government, not later than 30 days after the close of each six months' fiscal period, complete operating and income statements of the electric system in reasonable detail covering such six months' period, and, not more than 60 days after the close of each fiscal year, complete financial statements of the electric system and the Borrower covering such fiscal year, certified by independent auditors.

## Part Two

*In consideration of the grant, the borrower covenants that:*

1. *Construction work.*—All work on the project shall be done subject to the rules and regulations adopted by
181 the Administrator to carry out the purposes and control the administration of the Act. The follow-

ing rules and regulations as set out in Bulletin No. ., Nonfederal Projects revised March 3, 1934, entitled "P. W. A. REQUIREMENTS as to BIDS, CONTRACTORS' BONDS, AND CONTRACT, WAGE, AND LABOR PROVISIONS AND GENERAL INSTRUCTIONS as to APPLICATIONS AND LOANS AND GRANTS", shall be incorporated verbatim in all construction contracts for work on the project (in such construction contracts all blank spaces shall be filled in as provided in said Bulletin):

"1. (a) *Convict labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project.

"(b) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government engineer, no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week: Provided, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. Such wages shall in no event be less than the minimum hourly wage rates for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done, viz:

Skilled labor .....
Unskilled labor .....

182 "(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: Provided, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

"(c) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as 'unskilled laborers.'

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government engineer, in the full amount accrued to each individual at the time of closing of the pay rolls, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, however, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical aid insurance, in such amounts as are authorized by the laws of ..... to be paid by employees, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the
183 work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the engineer inspector shall be furnished with a sworn statement thereof on demand.

"(g) The Board of Labor Review (herein called the "Board") shall hear all labor issues arising under the

operation of this contract and such issues as may result from fundamental changes in economic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to change by the Administrator on recommendation of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in paragraph 2 (a), (b), and (c) hereof) all contracts for work on the project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased in an amount equal to such decreased cost.

"(i) Engineers, architects, and other professional and subprofessional employees engaged in duties normally done at the site of the project shall receive at least the prevailing rates for the various types of service to be rendered, provided that in no case shall professional employees receive less than the following weekly compensation for 40 hours or less irrespective of the number of hours employed: $36.00 in the northern zone; $33.00
184 in the central zone; and $30.00 in the southern zone. Where the working week is longer than 40 hours, weekly compensation shall be increased proportionally. Compensation under this paragraph shall be subject to the approval of the Government Engineer.

"3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivision and/or county) ..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or district) ..... : Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

"(b) *Employment services.*—To the fullest extent possible, labor required for the project and services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: Provided, however, That union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals which are authorized to furnish such labor residing in the locality within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals,
185 the labor preferences provided in section (a) of this paragraph 3 shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

"(c) *Compliance with Title I of the Act.*—The following sections, 7 (a) (1) and 7 (a) (2), of Title I of the Act shall be observed:

"'(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.'

"4. *Human labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater

expense by human labor than by use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. *Compensation insurance.*—Every employer of labor shall provide, if permitted by the laws of ....., adequate workmen's compensation insurance for all labor employed by him on the project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government engineer shall be given. Where it is not permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided by which the employees may, by paying the entire amount of the premiums, derive a similar protection.

186

"6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. *Withholding payment.*—Under all construction contracts, ..... may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

(The borrower)

"8. *Accident prevention.*—Reasonable precautions shall at all times be exercised for the safety of employees on the work and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment and other physical hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction of the Associated General Contractors of America, unless and to the extent that such provisions are

incompatible with Federal, State, or municipal laws or regulations.

"9. *N. R. A. Compliance.*—The contractor shall comply with each approved code of fair competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act (President's Reemployment Agreement), and ..... shall have
187 (The borrower)
the right, subject to the approval of the Government engineer, to cancel this contract for failure to comply with this provision and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor. So far as articles, materials, or supplies produced in the United States are concerned, no articles, materials, or supplies shall be accepted or purchased for the performance of the work nor shall any subcontracts be entered into for any articles, materials, or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials, or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid.

"10. (a) *Inspection of records.*—The Administrator, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence as, and in such form as, the Administrator, through his authorized agents, may require. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the engineer inspector such reasonable facilities as he may re-
188 quest. In case of dispute the Government engineer shall determine the reasonableness of the request.

"11. *Reports.*—Every employer of labor on the project shall report within 5 days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours work, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to be furnished to the Government engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to ....., to
(The borrower)
the Government engineer, and to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government engineer, such services shall be paid for in full at least once a month and such materials, tools, implements, and appliances shall be paid for at least once a month to the extent of 90 percent of the cost thereof to the contractor, and the remaining 10 percent shall be paid 30 days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. *Signs.*—Signs bearing the legend Public Works Project No. ..... shall be erected in appropriate places at the site of the project.

"14. All reasonable rules and regulations which the Public Works Administration may prescribe toward the
189 effectuation of the matters covered by paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

"15. *Subcontractors.*—(a) Appropriate provisions shall be inserted in all subcontracts relating to this work to in-

sure the fulfillment of all provisions of this contract affecting such subcontractors, particularly paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcontractor who has not signed U. S. Government Form No. P. W. A. 61, revised (March 1934).

"16. *Termination for breach.*—In the event that any of the provisions of paragraphs 1 to 15, inclusive, of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, ..... (The borrower) may, subject to the approval of the Government engineer, and upon request of the Administrator, shall terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within 10 days after the serving of such notice such violation shall cease, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination ..... (The borrower) ..... may take over the work and prosecute the same (The borrower) to completion or otherwise for the account and at the expense of the contractor and/or such subcontractor, and the contractor and his sureties shall be liable to ..... (The borrower) ..... for any excess cost occassioned ..... (The borrower) ..... (The borrower) in the event of any such termination, and ..... (The borrower) ..... may take possession of and utilize in com- (The borrower) pleting the work, such materials, appliances, and plant as may be on the site of the work, and necessary therefor. This clause shall not be construed to prevent the termination for other causes provided in the construction contract.

"17. *Definitions.*—The term 'Act' as used herein refers to the National Industrial Recovery Act. The term 'Government engineer' as used herein shall mean the State engineer (P. W. A. or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term 'engineer inspector' as used herein refers to State engineer inspectors, resident and assistant resident engineer inspectors, and supervising engineers,

190

appointed by the Administrator. The term 'materials' as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performances of the work."

2. *Restriction as to Contractors.*—The Borrower shall receive no bid from any contractor nor permit any contractor to receive any bid from any subcontractor who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

3. *Bonds and Insurance.*—Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, or materialmen, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Administrator.

4. *Force Account.*—All construction work on the Project shall be done under contract, provided, however, that if prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement to the contrary notwithstanding, to apply to the Administrator for permission to do all or any part of the Project on a force account basis.

191 Part Three

1. *Construction of Project.*—Not later than upon the receipt by it of the first Bond payment, the Borrower will commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, plans, drawings, specifications, and construction contracts which shall be satisfactory to the Administrator, and under such engineering supervision and inspection as the Administrator may require. Except with the written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage, or any conditional sale or title retention agreement.

2. *Information.*—During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction, cost, and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower as the Administrator or any such purchaser may at any time reasonably require.

3. *Representations and Warranties.*—The Borrower represents and warrants as follows:

(a) *Litigation.*—No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the security therefor, the construction of the Project, or the financial condition of the Borrower;

(b) *Financial Condition.*—The character of the assets and the financial condition of the Borrower are as
192 favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of such assets or in such financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(c) *Fees and Commissions.*—It has not and does not intend to pay any bonus, fee, or commission in order to secure the loan or grant hereunder;

(d) *Affirmation.*—Every statement contained in this Aggreement, in the Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government is correct and complete, and no relevant fact materially affecting the Bonds, the security therefor, the Grant or the Project, or the obligations of the Borrower under this Agreement has been omitted therefrom.

*Sale of Bonds by the Government.*—The Borrower will take all such steps as the Government may reasonably request to aid in the sale by the Government of any or all of the Bonds. Upon request, the Borrower will furnish to the Government or to any purchaser or purchasers from the Government of 25 per centum of the Bonds, information

for the preparation of a bond circular in customary form, signed by the proper official of the Borrower, containing such data as the Government or such purchaser or purchasers may reasonably request concerning the Borrower.

5. *Expenses.*—The Government shall be under no obligation to pay any costs, charges, or expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement including, without limiting the generality of the foregoing, the cost of preparing, executing, and delivering the Bonds, and any legal, engineering, and accounting costs, charges, or expenses incurred by the Borrower.

6. *Waiver.*—Any provision of this Agreement may
193 be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement.

7. *Interest of Member of Congress.*—No Member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise thereupon.

8. *Validation.*—The Borrower hereby covenants that it will institute, prosecute, and carry to completion insofar as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate, or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities, and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate, or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder, a letter from the Governor of the State, stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities, or irregularities in the proceedings of the Borrower relative

to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

9. *Miscellaneous.*—This Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement shall be governed
194 by and be construed in accordance with the laws of the State.

10. *Naming of Project.*—The Project shall never be named except with the written consent of the Administrator.

11. *Undue Delay by the Borrower.*—If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties or obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

12. *Construction of Agreement.*—If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity and effectiveness of any other provision of this Agreement or the rights or obligations of the parties hereto, provided, in the opinion of the Administrator, the Agreement does not then violate the terms of the Act.

IN WITNESS WHEREOF, the CITY OF DECATUR, MORGAN COUNTY, ALABAMA, and the UNITED STATES OF AMERICA have respectfully caused this Agreement to be duly executed as of the day and year first above written.

CITY OF DECATUR,
By JAMES A. NELSON,
*Mayor.*

[SEAL]
Attest:
E. W. COLLIER,
*City Clerk.*

UNITED STATES OF AMERICA,
By PHILIP B. FLEMING,
*Acting Deputy Federal Emergency Administrator of Public Works.*

195

## EXHIBIT 8

Agreement Terminating the Loan and Grant Agreement Between the City of Decatur (County of Morgan, Alabama) and the United States of America

P. W. A. Docket No. 6587

Agreement Dated as of Dec. 2, 1935, Terminating the Loan and Grant Agreement Dated as of December 6, 1934, and the Amendatory Loan Agreement Dated as of May 27, 1935, Between the City of Decatur, Morgan County, Alabama (Herein Called the "City"), and the United States of America (Herein Called the "Government")

WHEREAS a Loan and Grant Agreement was entered into by and between the City and the Government dated as of December 6, 1934, and

WHEREAS said Loan and Grant Agreement was amended by an Amendatory Loan Agreement by and between the City and the Government dated as of May 27, 1935, and

WHEREAS it is to the mutual advantage of the City and the Government to terminate said Loan and Grant Agreement and said Amendatory Loan Agreement,

NOW, THEREFORE, IT IS HEREBY AGREED by and between the City and the Government that said Loan and Grant Agreement dated as of December 6, 1934, and said Amendatory Loan Agreement dated as of May 27, 1935, be and the same hereby are terminated.

CITY OF DECATUR,
[SEAL] By JAMES A. NELSON, *Mayor.*

Exhibit 9 referred to in the foregoing motion is not printed at this point because it appears as Exhibit A to the defendants' answer to the third amended bill of complaint at p. 259 infra.

*City Clerk.*

205

## EXHIBIT 10

Loan and Grant Agreement Dated as of Dec. 28, 1934, Between the City of Florence, Alabama (Herein called the "Borrower") and the United States of America Herein Called the "Government"

P. W. 8751

Part One

1. *Purpose of Agreement.*—Subject to the terms and conditions of this Loan and Grant Agreement (herein called the "Agreement"), the Government will, by loan and grant not exceeding in the aggregate the sum of $436,000, aid the Borrower in financing a project (herein called the "Project") consisting of the construction of an electric distribution system, including substation, an office building and warehouse therefor, and other necessary appurtenances thereto, all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 4259, Title II of the National Industrial Recovery Act (herein called the "Act"), and the Constitution and Statutes of the State of Alabama, including particularly:

Act No. 107, General and Local Acts of Alabama, Extra Session, 1933, p. 100.

2. *Description of Bonds.*—(a) *Designation.*—Electric Distribution System Bond.

(b) *Authorized Principal Amount.*—$336,000.

(c) *Type.*—Special obligation, serial, coupon bonds.

(d) *Registration.*—Registerable at the option of the holder as to principal only.

(e) *Date.*—April 1, 1934.

(f) *Interest.*—At the rate of 4 per cent per annum, payable October 1, 1934, and semiannually thereafter on April 1 and October 1 in each year.

(g) *Maturities.*—Payable on April 1, in years and 206 amounts as follows:

| Year: | Amount | Year: | Amount |
|---|---|---|---|
| 1938 | $11,000 | 1949 | $15,000 |
| 1939 | 12,000 | 1950 | 15,000 |
| 1940 | 13,000 | 1951 | 15,000 |
| 1941 | 14,000 | 1952 | 15,000 |
| 1942 | 14,000 | 1953 | 15,000 |
| 1943 | 14,000 | 1954 | 15,000 |
| 1944 | 14,000 | 1955 | 15,000 |
| 1945 | 14,000 | 1956 | 20,000 |
| 1946 | 15,000 | 1957 | 20,000 |
| 1947 | 15,000 | 1958 | 20,000 |
| 1948 | 15,000 | 1959 | 20,000 |

(h) *Security.*—Special obligations of the Borrower, payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

(i) *Place and Medium of Payment.*—Payable at the office of the City Treasurer, Florence, Alabama, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York, in any coin or currency which, on the respective dates of payment of the principal of and interest on the Bonds, is legal tender for public and private debts.

(j) *Denomination.*—$1,000.

Other provisions may be substituted for the provisions of subparagraphs (a), (b), (c), (d), (e), (f), (g), (i), and (j) of this Paragraph by the Borrower if the consent of the Federal Emergency Administrator of Public Works (herein called the "Administrator") to such substitution is obtained.

3. *Amount and Method of Making Grant.*—The Government will make and the Borrower will accept, whether or not any or all of the Bonds shall be sold to a purchaser or purchasers other than the Government, a Grant in an amount equal to thirty per centum of the cost of the labor and materials employed upon the Project. Wherever the expression "cost of labor and materials" is used in this Agreement, such expression shall mean such cost as
207 determined by the Administrator, and his determination thereof shall be final. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds and/or interest coupons; provided, however, that if all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money.

4. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.*—If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance

its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.*—If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $436,000, being the cost estimated at the time when the Application was approved by the Government, or that the Borrower will be able to obtain, through additional borrowing or otherwise, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall believe to be necessary to complete the Project;

(c) *Compliance.*—If the Borrower shall not have complied, to the satisfaction of the Administrator, with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.*—If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the
208 Project;

(e) *Representations.*—If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) *Tennessee Valley Authority Contract.*—If the Borrower shall not execute a valid contract, satisfactory to the Administrator, between the Borrower and the Tennessee Valley Authority, under the terms of which the Tennessee Valley Authority will supply electrical energy to the Borrower, and will permit the Borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of and interest upon the Bonds;

(g) *Rate and Bond Ordinances.*—If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by the Project and the ordinance providing for the authorization,

issuance, and sale of the Bonds, and the use of the revenues derived from the operation of the Project, shall not be satisfactory in form and substance to the Administrator;

(h) *Court Decision.*—If the Supreme Court of Alabama shall not have rendered a decision which satisfies the Administrator that the Borrower may legally construct the Project, authorize and sell the Bonds, make all covenants and agreements contained in the Bonds, the proceedings authorizing their issuance and sale and in this Agreement, and enter into the contract with the Tennessee Valley Authority referred to in subparagraph (f) of Paragraph 4, PART ONE, hereof.

5. *Bond Counsel and Bond Proceedings.*—When
209 this Agreement has been executed the Borrower (unless it has already done so) shall promptly:

(a) Retain municipal bond counsel satisfactory to the Administrator to assist the Borrower in the proceedings relative to the authorization, issuance, and sale of the Bonds and to give legal opinions on such matters relative thereto as may be requested by the Administrator; and

(b) Take all the proceedings necessary for the authorization and issuance of the Bonds.

6. *Bond and Grant Requisitions.*—From time to time after the execution of this Agreement, the Borrower shall file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "Requisition").

7. *Bond Purchases.*—If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, in such amount as will provide, in the judgment of the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at the Birmingham Branch of the Federal Reserve Bank of Atlanta, Birmingham, Alabama (herein called the "Reserve Bank"), or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, and

all unmatured interest coupons appertaining thereto, together with such documents as may be requested by the Administrator. The Government shall be under no
210 obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the Project.

8. *Grant by Payment of Money.*—If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at the Reserve Bank or at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) Twenty-five per centum of the cost of the labor and materials shown in the Requisition to have been employed upon the Project if the Requisition shows that the Project has not been completed, or

(b) Thirty per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined;

*Provided, however,* that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between $436,000 and the aggregate principal amount of the Bonds purchased by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds and/or interest coupons rather than by payment of money if the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

9. *Grant by Cancellation of Bonds.*—If the Borrower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and/or interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between
211 thirty per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in

an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

10. *Grant Advances.*—At any time after the execution of this Agreement the Government may, upon request of the Borrower, if, in the judgment of the Administrator, the circumstances warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of thirty per centum of the cost of the labor and materials to be employed upon the Project, as estimated by the Administrator.

11. *Deposit of Bond Proceeds and Grant; Bond Fund; Special Accounts.*—The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 9, PART ONE, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 8, PART ONE, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "Special Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator. Provided, however, that interest on said Bonds accruing prior to
212 complete construction of the Project shall be paid from the proceeds of said Bonds to the extent such interest is not available from funds received as accrued interest, and, provisions shall be made that, upon the delivery of said Bonds and the receipt of the proceeds, a sufficient sum, including the accrued interest received, shall be withdrawn from the proceeds and placed in said Bond Fund to pay said interest.

12. *Disbursement of Monies in Special Accounts and Bond Fund.*—The Borrower shall expend the monies in a Special Account only for such purposes as shall have been previously specified in Requisitions filed with the Govern-

ment and approved by the Administrator. Any monies remaining unexpended in any Special Account after the completion of the Project which are not required to meet unpaid obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

13. *Other Financial Aid from the Government.*—If the Borrower shall receive any funds directly or indirectly from the Government or any agency or instrumentality thereof, other than the Loan or Grant, to aid in financing the construction of the Project, to the extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

213 Part Two

*In consideration of the grant, the borrower covenants that:*

1. *Construction Work.*—All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the act. The following rules and regulations as set out in Bulletin No. 2, revised on March 3, 1934, entitled, "P. W. A. Requirements as to Bids, Contractor's Bonds, and Contract, Wage, and Labor Provisions and General Instructions as to Applications and Loans and Grants", shall be incorporated verbatim (except that in all places where the term "Borrower" is used the name the Borrower shall be inserted) in all construction contracts for work on the Project:

"1. (a) *Convict labor.*—No convict labor shall be employed on the Project and no materials manufactured or produced by convict labor shall be used on the Project.

"(b) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government Engineer, no

individual directly employed on the Project shall be permitted to work more than eight hours in any one day nor more than thirty hours in any one week: *Provided,* That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any one week to be made up in the succeeding twenty days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. *Wages.* (a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and com-
214 fort. Such wages shall in no event be less than the minimum hourly wage rate for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done, viz:

| | |
|---|---|
| Skilled labor | $1.00 |
| Unskilled labor | .40 |

"(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rate shall apply: Provided, That such agreed wage rates shall be effective for the period of this contract, but not to exceed twelve months from the date of the contract.

"(c) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as 'unskilled laborers.'

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the Project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the Act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government Engineer, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest

date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, however, that this clause shall not be construed to prohibit
the making of deductions for premiums for compen-
215 sation and medical aid insurance, in such amounts
as are authorized by the laws of the State of Alabama to be paid by employees, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical-aid insurance authorized by the laws of the State of Alabama, should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Engineer Inspector shall be furnished with a sworn statement thereof on demand.

"(g) The Board of Labor Review (herein called the 'Board') shall hear all labor issues arising under the operation of this contract and such issues as may result from fundamental changes in economic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to change by the Administrator on recommendation of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in Paragraph 2 (a), (b), and (c) hereof) all contracts for work on the Project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased by an amount equal to any such decreased cost.

"(i) Engineers, architects, and other professional
216 and subprofessional employees engaged on the Proj-

ect shall receives the prevailing local rates for the various types of service to be rendered, except that in no case shall they receive less than the hourly rates set for the highest paid class of skilled labor directly employed on the Project.

"3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the City of Florence, and/or Lauderdale County, Alabama, and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State of Alabama: Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

"(b) *Employment services.*—To the fullest extent possible, labor required for the Project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: Provided, however, that union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals which are authorized to furnish such labor residing in the locality within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the labor pref-
217 erences provided in Section (a) of this Paragraph 3 shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

"(c) *Compliance with Title I of the Act.*—The following sections 7 (a) (1) and 7 (a) (2) of Title I of the Act shall be observed:

"'(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union to refrain from joining, organizing, or assisting a labor organization of his own choosing;'

"4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economic and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. *Compensation Insurance.*—Every employer of labor shall provide, if permitted by the laws of the State of Alabama, adequate workmen's compensation insurance for all labor employed by him on the Project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government Engineer shall be given. Where it is not
218 permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided, by which the employees may, by paying the entire amount of the premium, derive a similar protection.

"6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the Project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. *Withholding payment.*—Under all construction contracts, the Borrower may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work, the difference

between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

"8. *Accident prevention.*—Reasonable precautions shall at all times be exercised for the safety of employees on the work and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment and other physical hazards shall be guarded in accordance with the safety provisions of the 'Manual of Accident Prevention in Construction' of the Associated General Contractors of America, unless and to the extent that such provisions are incompatible with Federal, State, or municipal laws or regulations.

"9. (a) *N. R. A. materials.*—So far as articles, materials, and supplies produced in the United States are concerned, only articles, materials, and supplies produced under codes of fair competition under Title I of the Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the Government Engineer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

219

"(b) *Local preference.*—So far as practicable, and subject to the provisions of section (a) of this Paragraph 9, preference shall also be given to the use of locally produced materials if such does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the Government Engineer; but there shall be no requirement providing price differentials for, or restricting the use of materials to, those produced within the Nation or State.

"10. (a) *Inspection of records.*—The Administrator, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator, through his authorized agents, the names and addresses of all personnel, and such schedules of the costs of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Administrator, through his authorized agents, may re-

quire. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the Engineer Inspector such reasonable facilities as he may request. In case of dispute the Government Engineer shall determine the reasonableness of the request.

"11. *Reports.*—Every employer of labor on the Project shall report within five days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective payrolls directly connected with the Project, the aggregate amounts of such pay rolls, and the man-hours
220 worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to be furnished to the Government Engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to the Borrower, to the Government Engineer, and to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government Engineer, such services shall be paid for in full at least once a month and such materials, tools, implements, and appliances shall be paid for at least once a month to the extent of 90% of the cost thereof to the contractor, and the remaining 10% shall be paid thirty days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. *Signs.*—Signs bearing the legend 'PUBLIC WORKS PROJECT No. 4259' shall be erected in appropriate places at the site of the Project.

"14. All reasonable rules and regulations which the Administrator may prescribe toward the effectuation of the matters covered by Paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

"15. *Subcontractors.*—(a) Appropriate provisions shall

be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such contractors, particularly Paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcon-
221 tractor who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

"16. *Termination for breach.*—In the event that any of the provisions of Paragraphs 1 to 15, inclusive, of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, the Borrower may, subject to the approval of the Government Engineer, and upon request of the Administrator shall, terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within ten days after the serving of such notice, such violation shall cease, the contract shall, upon the expiration of said ten days, cease and terminate. In the event of any such termination the Borrower may take over the work and prosecute the same to completion or otherwise for the account and at the expense of the contractor and/or subcontractor, and the contractor and his sureties shall be liable to the Borrower for any excess cost occasioned the Borrower in the event of any such termination, and the Borrower may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work, and necessary therefor. This clause shall not be construed to prevent the termination for other causes provided in the construction contract.

"17. *Definition.*—The term 'Administrator' as used herein refers to the Federal Emergency Administrator of Public Works. The term 'Act' as used herein refers to the National Industrial Recovery Act. The term 'Government Engineer' as used herein shall mean the State Engineer (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this Agreement by the Administrator. The term 'Engineer Inspector' as used refers to State Engineer In-
spector, Resident and Assistant Resident Engineer
222 Inspectors, and Supervising Engineers, appointed by the Administrator. The term 'materials' as used herein includes, in addition to materials incorporated in the

Project or used or to be used in the operation thereof, equipment and other material used and/or consumed in the performance of the work.

2. *Restriction as to Contractors.*—The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

3. *Bonds and Insurance.*—Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, of materialmen, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Government Engineer.

4. *Force Labor.*—If prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement notwithstanding, to apply to the Administrator for permission to do all or any part of the Project by day labor, upon such conditions as the Administrator may impose.

Part Three

1. *Construction of Project.*—Not later than upon the receipt by it of the first Bond payment, the Borrower will promptly commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, such engineering supervision and inspection as the Administrator or his representatives may require, and plans, drawings, specifications, and construction contracts which shall be
223 satisfactory to the Administrator. Except with the prior written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage or any conditional sale or title-retention agreement.

2. *Information.*—During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction, cost, and progress of the work. The Bor-

rower will furnish to the Government, and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower and the Project as the Administrator or any such purchaser may at any time reasonably require.

3. *Representations and Warranties.*—The Borrower represents and warrants as follows:

(a) *Litigation.*—No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the construction and operation of the Project, or the financial condition of the Borrower;

(b) *Financial Condition.*—The character of the assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of its assets or in its financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(c) *Fees and Commissions.*—No fee or commission has been or will be paid by the Borrower or any of its officers, employees, agents, or representatives, and no agreement to pay a fee or commission has been or will be entered into by or on behalf of the Borrower, or any of its officers, employees, agents, or representatives, in order to secure the Loan or Grant hereunder;

(d) *Affirmation.*—Every statement contained in
224 this Agreement, in the Borrower's Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government by or on behalf of the Borrower is correct and complete, and no relevant fact materially affecting the Bonds, the Grant, or the Project, or the obligations of the Borrower under this Agreement has been, or will be, omitted therefrom.

4. *Sale of Bonds by the Government.*—The Borrower will take all such steps as the Government may reasonably request to aid in the sale by the Government of any or all of the Bonds. Upon request, the Borrower will furnish to the Government or to any purchaser from the Government of 25 per centum of the Bonds, information for the preparation of a bond circular in customary form, signed by the proper official of the Borrower, containing such data as the

Government or such purchaser may reasonably request concerning the Borrower and the Project.

5. *Expenses.*—The Government shall be under no obligation to pay any costs, charges, and expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement including, without limiting the generality of the foregoing, the cost of preparing, executing, or delivering the Bonds or obtaining all legal opinions requested by the Administrator.

6. *Waiver.*—Any provision of this Agreement may be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement, if, in the opinion of the Administrator, which shall be conclusive, such waiver or amendment does not substantially vary the terms of this Agreement.

7. *Interest of Member of Congress.*—No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agree-
225 ment, or to any benefit to arise therefrom.

8. *Validation.*—The Borrower hereby covenants that it will institute, prosecute, and carry to completion insofar as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate, or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities, and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate, or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder, a letter from the Governor of the State of Alabama stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities, or irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

9. *Miscellaneous.*—Subject to the limitations herein con-

tained, this Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement shall be governed by and be construed in accordance with the laws of the State of Alabama.

10. *Naming of Project.*—The Project shall not be named except with the written consent of the Administrator.

11. *Undue Delay by the Borrower.*—If, in the opinion of the Administrator, which shall be conclusive, the
226 Borrower shall delay for an unreasonable time in carrying out any of the duties of the obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

12. *Nature of Liability.*—It is expressly understood and agreed that this Agreement does not constitute an indebtedness of the Borrower within the meaning of any provision or limitation of the Constitution of the State of Alabama and it is hereby made a condition of this Agreement that the covenants, agreements, representations, and warranties herein contained do not and shall never impose a pecuniary liability upon the Borrower or charge against its general credit.

13. *Construction of Agreement.*—If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity and effectiveness of any other provision of this Agreement or the right or obligations of the parties hereto, provided in the opinion of the Administrator, the agreement does not then violate the terms of the Act.

IN WITNESS WHEREOF, the CITY OF FLORENCE, ALABAMA, and the UNITED STATES OF AMERICA have, respectively, caused this Agreement to be duly executed as of the day and year first above written.

CITY OF FLORENCE, ALABAMA,
By LEE GLENN, *Mayor.*

UNITED STATES OF AMERICA,
By HAROLD L. ICKES,
*Federal Emergency Administrator of Public Works.*

[SEAL]

Attest:
S. P. HOWARD,
*City Clerk.*

227

## EXHIBIT 11

Agreement Terminating the Loan and Grant Agreement Between the City of Florence (County of Lauderdale, Alabama) and the United States of America.

P. W. A. Docket No. 4259

Agreement Dated as of Dec. 2, 1935, Terminating the Loan and Grant Agreement Dated as of December 28, 1934, and the Amendatory Loan Agreement Dated as of April 15, 1935, Between the City of Florence, Lauderdale County, Alabama (Herein Called the "City") and the United States of America (Herein Called the "Government")

WHEREAS a Loan and Grant Agreement was entered into by and between the City and the Government dated as of December 28, 1934, and

WHEREAS said Loan and Grant Agreement was amended by an Amendatory Loan Agreement by and between the City and the Government dated as of April 15, 1935, and

WHEREAS it is to the mutual advantage of the City and the Government to terminate said Loan and Grant Agreement and said Amendatory Loan Agreement,

NOW, THEREFORE, IT IS HEREBY AGREED by and between the City and the Government that said Loan and Grant Agreement dated as of December 28, 1934, and said Amendatory Loan Agreement dated as of April 15, 1935, be and the same hereby are terminated.

CITY OF FLORENCE,

By LEE GLENN, *Mayor.*

UNITED STATES OF AMERICA,

*Federal Emergency Administrator of Public Works.*

(Sgd.) HORATIO B. HACKETT,
*Assistant Administrator.*

[SEAL]

Attest:
S. B. HOWARD,
*City Clerk.*

Exhibit 12 referred to in the foregoing motion is not printed at this point because it appears as Exhibit B to the defendants' answer to the third amended bill of complaint at p. 278 infra.

# United States Court of Appeals for the District of Columbia

**OCTOBER TERM, 1935.**

# No. 6583

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

*vs.*

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; JOHN J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DIVISION OF DISBURSEMENT OF THE TREASURY OF THE UNITED STATES, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.


| | Original | Print |
|---|---|---|
| Caption | a | 1 |
| Memoranda: Bill of complaint—filed, temporary restraining order—filed, injunction undertaking $5,000 approved and filed | 1 | 2 |
| Defendants' motion to dismiss the bill of complaint | 2 | 2 |


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INDEX


| | Original | Print |
|---|---|---|
| Amended bill of complaint for an injunction and other relief | 4 | 3 |
| Order dismissing bill of complaint | 34 | 28 |
| Appeal noted by plaintiff, bond for costs on appeal, &c., fixed | 35 | 28 |
| Order for injunction | 36 | 29 |
| Memoranda: Injunction undertaking $5,000 approved and filed, $50 deposit in lieu of cost bond | 38 | 30 |
| Assignment of errors | 39 | 30 |
| Designation of record | 40 | 31 |
| Clerk's certificate | 42 | 32 |

# United States Court of Appeals for the District of Columbia

No. 6583.

ALABAMA POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator, et al.

*a* Supreme Court of the District of Columbia.

In Equity.

No. 59671.

ALABAMA POWER COMPANY, a Corporation, Plaintiff,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof; John J. Madigan, Acting Executive Officer Thereof, et al., Defendants.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity.

No. 59671.

ALABAMA POWER COMPANY, a Corporation, Plaintiff,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof; John J. Madigan, Acting Executive Officer Thereof; F. E. Schnepfe, Director of Projects Division Thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States, Defendants.

*Memoranda.*

October 4, 1935.—Bill of Complaint filed. Temporary Restraining Order filed. Injunction Undertaking $5000 approved and filed.

2 *Defendants' Motion to Dismiss the Bill of Complaint.*

Filed October 14, 1935.

* * * * * * *

Now come the defendants and move this Court to dismiss the bill of complaint herein for want of equity, in that:

I.

The bill of complaint does not set forth a cause of action nor any matter entitling the plaintiff to the relief prayed for against the defendants herein or any of them.

3 II.

The bill of complaint does not present a justiciable controversy of which this Court has jurisdiction.

III.

The plaintiff has not the capacity to maintain this suit, and does not show any injury or interest entitling it to maintain the same.

IV.

The suit is in effect against the United States of America and as such may not be maintained.

V.

The acts which the bill alleges the defendants propose or threaten to perform are valid and duly authorized by law and by the Constitution of the United States.

ANGUS D. MacLEAN,
*Assistant Attorney General.*
ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*
JOHN W. SCOTT,
*Special Assistant to the Attorney General.*
HENRY T. HUNT,
*General Counsel for the Administrator of Public Works.*
LESLIE C. GARNETT,
*United States Attorney for the District of Columbia.*
DAVID A. PINE,
*Assistant United States Attorney.*

4 Leave to file, granted. Oct. 14", 1935.
JESSE C. ADKINS.

*Amended Bill of Complaint for an Injunction and Other Relief.*

Filed October 14, 1935.

* * * * * * *

Now comes the plaintiff, and by leave of Court files this its amended bill of complaint, and for its causes of action against the defendants alleges:

Paragraph I.

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, is a resident and citizen of the State of Alabama, and has its principal office and corporate domicile in the City of Attalla, Alabama, and sues in its own right.

Paragraph II.

The defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found within the District of Columbia, and are more particularly identified as herein specifically set forth:

Harold L. Ickes is the duly appointed, qualified, and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United States of America dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act."

Horatio B. Hackett is the duly appointed, qualified, and acting Assistant Administrator of PWA.

John Herrick is the duly appointed, qualified, and acting Executive Assistant of PWA.

John J. Madigan is the duly appointed and qualified Acting Executive Officer of PWA.

F. E. Schnepfe is the duly appointed, qualified, and acting Director of Projects Division of PWA.

Henry Morgenthau, Jr. is the duly appointed, qualified, and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. Julian is the duly appointed, qualified, and acting Treasurer of the United States and, as such, is under the supervision of the Secretary of the Treasury, in control of the disbursement of the public funds of the United States.

Guy Allen is the duly appointed, qualified, and acting Chief Disbursing Officer of the Treasury Department and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual drawing and issuing of checks on behalf of the United

States and the actual disbursements of the public funds of the United States.

Each of the foregoing officers or employees is sued on account of acts which he threatens to perform under
6 pretended authority of the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and the President's Executive Order of June 7, 1935.

Paragraph III.

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

Paragraph IV.

Plaintiff alleges that by its charter it has the right to manufacture, supply and sell to the public electric energy produced either by steam or by water as a motive force, or by both, for lighting, heating, power and other purposes. Plaintiff now owns and operates electric public utility properties, serving the public in sixty-five of the sixty-seven counties of the State of Alabama. These properties consist of hydro-electric and of steam generating plants, of high tension transmission lines, of distribution lines, and all equipment and facilities necessary for use in generating, transmitting, distributing, metering and delivering electric energy to meet the demands of electricity consumers in the State of Alabama.

Plaintiff is now serving, directly and indirectly, approximately two hundred thousand (200,000) customers within said State, and its gross electrical revenue received therefrom in 1934 was approximately Fifteen Million Dollars ($15,000,000). Plaintiff's system is an integrated whole, coordinated so as to anticipate future needs and growth of the communities in the State of Alabama, and represents intensive application of the economies of large-scale, integrated power development. The loss of substantial numbers of its customers in any particular locality would materially impair the benefits to it and its customers derived from such integration.

7 Plaintiff's system is modern and efficient and in all respects equipped to furnish the public in Alabama with electricity service according to the most ad-

vanced standards of electrical engineering. The capacity of its hydro-electric plants alone is adequate to furnish more than the present demand upon it for electricity within said State.

Among other communities served by said system are the Town of Guntersville, County of Marshall, the Town of Hartselle, County of Morgan, and the Town of Russellville, County of Franklin, (hereinafter sometimes referred to as the Towns). These Towns are located in the northern portion of the State of Alabama, and together form a vital link in the plaintiff's system in that region. The following table indicates the approximate population of each of said Towns, the approximate number of customers served by plaintiff therein and the gross revenues of plaintiff from its electrical operations therein for the twelve months ended December 31, 1934:

| Town | Approximate Population | Approximate No. of Customers | Gross Revenues of Plaintiff from such electric operations for year ending December 31, 1934 |
|---|---|---|---|
| Guntersville | 2826 | 546 | $51,546.07 |
| Hartselle | 2204 | 560 | 24,507.11 |
| Russellville | 3146 | 564 | 71,186.07 |

Paragraph V.

The plaintiff's system, including that portion represented by the aforesaid three towns and the customers therein, is served almost entirely by plaintiff's hydro-electric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, which was constructed by authority of an Act of Congress (34 Stat. 1288), whereby plaintiff was granted a license to build a dam across said river, a navigable water of the United States, at the location named, for the improvement of navigation on such river and the development of the water power inher-
8 ent therein; and Mitchell Dam and Jordan Dam, likewise on the Coosa River in Alabama; and Martin Dam on the Tallapoosa River in Alabama, which latter three dams were constructed under licenses from the Federal Power Commission, authorized by the Federal Water Power Act (41 Stat. 1063).. In granting such licenses the Federal Power Commission in each instance found:

1. That each of such dams on the Coosa River and the dam on the Tallapoosa River were necessary and con-

venient for the development and improvement of navigation and utilization of power in the respective rivers;

2. That such dams were best adapted to a comprehensive scheme of development and utilization of such waterways for such purposes;

3. That there was a market in Alabama for the power output of such plants;

4. That such dams were justified in the public interest.

Under and by such licenses, plaintiff was required to expend large sums in preparing certain portions of the river beds for future navigation to and through such dams and in the building of piers in the streams to form ultimate navigation guides to such locks; and, in addition, so to construct such dams that locks could be erected therein as and when the United States determined to complete the navigation from one pool level to the next; by the terms of the licenses, the licensee was required to permit of discharge through its dams, free of cost to the United States, of such part of the flow of the river necessary for the purpose of such lockage and to install such lights, signals, and power for the operation of such navigation structures as might be installed in the future by the United States; and with respect to Lay Dam, the plaintiff is required to convey to the United States a right of way around the end of such dam, and by the subsequent licenses issued to the plaintiff under which Mitchell Dam was erected, the plaintiff
9 was required to make such excavations and perform such other channel work to complete a passage way from the lock around Lay Dam to the pool level created by Mitchell Dam as might be necessary; and in connection with all such work plaintiff spent a large amount of money and has obligations in connection with the future use of such facilities and locks for navigation purposes in a sum that is not capable of present ascertainment. Under and by virtue of such licenses, plaintiff was required also to make such installations in the Coosa River projects as the Federal Power Commission should deem necessary from time to time to supply adequately the reasonable market demands of the pubilc. Such hydro-electric projects on the Coosa and Tallapoosa were built at a cost to the plaintiff of an amount in excess of $60,000,000. The completion of such projects on the Coosa River created contiguous slack water pools of 57 miles in length, and when such pools are

connected by locks placed in the aforementioned dams such pools will afford a nine-foot depth navigation on such river for a distance of 49 miles.

Plaintiff in good faith accepted the licenses from the Federal Power Commission and built Mitchell and Jordan Dams, resulting in the creation of navigable features of the Coosa and Tallapoosa Rivers as set out above, and in the improvement of the navigable features of the Alabama River, all with the agreement and understanding under the Federal Water Power Act and the licenses issued to plaintiff thereunder that the plaintiff would secure, as the consideration moving to it for the investment in excess of $60,000,000 made under the licenses so issued, the right and privilege freely to serve the market in Alabama with electric energy.

Paragraph VI.

Plaintiff is authorized by the laws of the State of Alabama to construct, own, operate, and maintain its
10 plant facilities and systems in each of the municipalities in which it renders electric service, including Guntersville, Hartselle and Russellville.

On August 10, 1915 the Town of Hartselle, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

On July 5, 1915, the Town of Guntersville, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

On June 28, 1923, the Town of Russellville, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

None of the above mentioned grants of franchises and rights to plaintiff contains any limitation as to the duration of such franchise and right, nor does the general law of the State of Alabama or the corporate powers of plaintiff impose any limit on the duration of such franchise and right, but all of the above mentioned franchises are in perpetuity, and are now in full force and effect.

Plaintiff has continuously and without interruption exercised and performed said franchises from the date of their original grant to the date of the filing of this bill of complaint.

Plaintiff is the only person, firm or corporation engaged in supplying electric light and power to the three towns named herein and their inhabitants and is the only person, firm or corporation now able to supply electric light and power to such towns and their inhabitants.

11 Paragraph VII.

The plaintiff's properties, plants, lines, and other facilities are modern and efficient and the plaintiff is equipped to and does render efficient and adequate electric utility service in all the municipalities and rural districts in which it operates, including the aforesaid three towns, and possesses facilities of adequate capacity to continue the rendition of such type of service for a considerable time in the future without substantial additions thereto.

The rates for sale of electric power and energy of the plaintiff and the character of its service in the State of Alabama are subject to regulation of and are regulated by the State of Alabama through its Public Service Commission; and the rates now in effect in the territory served by the plaintiff in the State of Alabama and in the three towns aforesaid are rates approved as reasonable by, and placed in effect pursuant to order of, the Alabama Public Service Commission.

Paragraph VIII.

Plaintiff alleges that its electricity business in the aforesaid three towns is conducted pursuant to valid and subsisting franchise privileges granted to it by the Government of the United States through the Act of Congress and the licenses of the Federal Power Commission referred to in Paragraph V, and by the aforesaid three Towns, as alleged in Paragraph VI.

In reliance upon the grant of such franchise privileges, many thousands of dollars have been invested in the plaintiff's stocks and bonds, large amounts of which are held and owned by the general public, a very substantial part of its bonds and preferred stock having been sold to its

customers and to other citizens and investors residing in the territory in which it operates.

12 Paragraph IX.

Plaintiff is a taxpayer of each of the said Towns of Guntersville, Hartselle and Russellville, and of the Counties in which such Towns are located, and with respect to its electrical properties and operations in each of said Towns has paid to said Towns and said Counties many thousands of dollars in taxes in the past, and for the twelve months ended December 31, 1934, has paid or incurred the liability to pay such taxes as indicated in the following table:

| City or Town | Tax Paid | County | Tax Paid |
|---|---|---|---|
| Guntersville | $1,468.22 | Marshall | $6,720.68 |
| Hartselle | 579.49 | Morgan | 10,070.71 |
| Russellville | 1,350.24 | Franklin | 4,110.17 |

Plaintiff is likewise a taxpayer of the State of Alabama, and with respect to its electrical properties and operations in said State has paid to said State many thousands of dollars in taxes in the past, large portions of which sums are paid back by the State to the various communities, including the three Towns aforesaid, to be expended by such communities for their municipal purposes; and for the twelve months ended December 31, 1934, plaintiff has paid, or incurred the liability to pay, such taxes to the State in excess of the sum of Nine Hundred Thousand Dollars ($900,000.00). Plaintiff has incurred the liability to pay taxes to the Towns, the counties, the State, and other political subdivisions, for the current tax year 1935, in approximately the same amounts as paid and incurred for the year 1934, as aforesaid.

Paragraph X.

Plaintiff is a taxpayer of the United States, and with respect to its electrical properties and operations in the State of Alabama, including the properties and operations in each of the aforesaid three Towns, has paid to the United States many thousands of dollars in taxes in the past; and under the provisions of an Act of Con-
13 gress, approved June 16, 1933 (48 Stat. 254, 256), for the period ended August 1, 1935, has paid, or

incurred the liability to pay to the United States excise taxes in the sum of Two Hundred Seventy Thousand Dollars ($270,000.00) and has incurred the liability to pay to the United States similar taxes for the current year of 1935.

Paragraph XI.

PWA, under the direction of defendant Ickes, has conceived and for some time past has been executing throughout the country a plan to fix the rates of privately owned electricity utilities at levels determined by PWA to be "socially desirable" and to promote public ownership of electricity utilities, regardless of local state policy, as a "yardstick" of electricity rates and service to which privately owned electricity utilities must conform. This plan is not intended to have and, in fact, does not have any relation to interstate commerce; its intended and actual effect is control and regulation of entirely local and intrastate commerce.

The plan is effectuated by soliciting and inducing municipalities and other political subdivisions of the several states to permit PWA to institute and to carry out, as Federal Public Works Projects, the construction of electricity generating and distributing systems within such subdivisions, such systems being planned, built and financed by and under the control and direction of PWA and being operated by PWA through its retention of absolute control over the rates to be charged for the service of such systems when completed.

Upon tentative selection of an area for such a Project, PWA usually informs existing private electricity utilities in such area that to escape being superseded by or suffering competition from such a system such private
14 utilities must establish rates satisfactory to PWA and, in effect, consent to continuing PWA regulation of their rates under the threat of destruction. The rates so exacted are arbitrarily set by PWA, do not provide a reasonable return to such utilities upon their investment, are much less than those fixed by authorized state regulatory bodies, and are determined without hearing such utilities and without any consideration whatever of the elements required by the due process clauses of the Fifth and Fourteenth Amendments to be considered in rate regu-

lation. Plaintiff cannot aver with particularity the level to which such privately owned utilities are required to conform because PWA has never adopted definite criteria but acts in each case according to an arbitrary and vaguely formulated conception of "social desirability". In general, however, such level is that at which a system built and operated by PWA as aforesaid would earn enough to pay operating costs without provision for Federal, state, or local taxes, and to repay over a long period of time so much of the cost of construction thereof as is represented by the pretended loan made by PWA as hereinafter described; and in many instances PWA requires a level even lower.

If the existing private utilities in such area conform to the standard so fixed by PWA, PWA usually suspends consummation of such a Federal Public Works Project for a time sufficient to enable it to be assured that such conformity is in good faith and permanent and then, if satisfied, PWA usually abandons the project. Otherwise PWA proceeds to consummate the project, as heretofore and hereafter described, and either subjects the private utilities to rate-war to attain the rate level desired by PWA and if possible to drive such utilities out of business, or induces the state regulatory bodies to revoke the privileges of such utilities to do business.

This plan is frankly acknowledged by PWA in public press releases, in public statements of the Administrator, in instructions given to PWA agents charged with the administration of PWA functions, in negotiations with existing private utilities, and otherwise.

In deciding thus to build electricity generating and distributing systems, the sole consideration entertained by PWA is the rate level of existing privately owned utilities. The extent of unemployment in the vicinities, or elsewhere, and the relation between the employment given by such a Project and the character of workers unemployed, the dependability and economic soundness of existing private utilities, the capacity of the areas to absorb increased electricity production, and other considerations relating to the need for such a PWA electicity system are excluded entirely by PWA in reaching its decision to build and operate such a Project.

To induce the necessary cooperation of municipalities and other political subdivisions in the various states and to

procure their consent to such Federal Public Works Projects and to the regulation of the rates of existing privately owned utilities by PWA in accordance with the aforesaid plan, PWA, by advertising and other newspaper publicity and by circulars and direct statements made to municipalities by authorized agents has represented that it would authorize and direct the construction, as Federal Public Works Projects, of electricity generating and distributing systems, to become the property of such municipalities. The representations have been that thirty percent or more, in the present case forty-five percent, of the cost of the Project would be an outright gift, the balance of the cost to be repaid to PWA, if at all, out of the revenue of the system; and that thus no risk would be incurred by the municipality. When the municipality consents to such a Project and PWA decides to threaten existing utilities with its consummation, a so-called loan and grant arrangement is entered into similar to the so-called agreements between PWA and the Towns of Guntersville, Hartselle and Russellville, hereinafter described. Such an arrange-
16 ment constitutes a pretense and sham in that it does not in fact provide for a loan but merely for the possible recapture of a part of the cost of such projects out of the earnings thereof and imposes no obligations upon said municipalities and confers no authority upon them in the construction thereof, all as more specifically hereinafter set forth.

All the acts of the defendants hereinafter in this Bill of Complaint complained of are done or threatened in pursuance of the plan hereinbefore alleged; that is to say, PWA determined that plaintiff's rates in the aforesaid Towns were higher than rates determined by PWA to be socially desirable and, without affording the plaintiff the opportunity usually afforded such utilities, in accordance with the said plan, to conform to the rates determined upon by PWA in such case, authorized the Federal Public Works Projects hereinafter described solely in order to drive plaintiff out of business in the aforesaid Towns and attain the rate level desired by PWA. The aforesaid Towns were induced by PWA to consent to said Federal Public Works Projects and to take the steps hereinafter alleged in cooperation therewith and with PWA by the representations hereinbefore alleged.

Paragraph XII.

The aforesaid Towns, moved by the actions and inducement alleged in Paragraph XI, filed with PWA applications for Federal Public Works Projects consisting of electric distributing systems to be owned by said Towns, respectively.

While the procedure pursued by PWA, defendant Ickes and his agents in passing upon such applications does not provide for a hearing from those whose property and rights will be injured or destroyed through the authorization and construction of such municipal systems, plaintiff requested and sought a hearing before PWA relative to the ap-
17 plications of the aforesaid Towns. Plaintiff has, however, constantly been denied the privilege of such hearing. Nevertheless, plaintiff filed with PWA a written protest against the approval of the applications of said Towns. Such protest set out in substance the facts heretofore and hereafter alleged in this bill. There is no further board, agency or official of the United States to whom plaintiff may apply to prevent the consummation of the Projects in said Towns. Consequently, plaintiff has exhausted all administrative remedies which it could possibly have to prevent such action.

Notwithstanding plaintiff's protests of the loans and grants aforesaid, plaintiff is informed, believes and avers that such protests were given no consideration whatsoever by PWA, but that, for no purpose other than that of driving down plaintiff's rates and destroying plaintiff's business in accordance with the plan of PWA as aforesaid, and upon findings that the action of PWA would in fact destroy and drive out plaintiff's business in said Towns, PWA approved such Public Works Projects for such Towns, to be carried out under pretended loan and grant agreements with the Towns in the amounts set out hereafter, the funds to be used in the erection and construction, as Federal Public Works Projects under the direction and control of PWA, of complete electric distribution systems in the Towns to serve the same parties and purposes as are now served by plaintiff therein. The amounts proposed to be given to the Towns are equal to forty-five per cent of the cost of labor and materials to be employed in the construction of such electric distribution systems. The pretended

loans and grants plaintiff alleges, upon information and belief, to be of the approximate amounts set out as follows:

| Town | Loan | Grant |
|---|---|---|
| Guntersville | $48,000.00 | $39,272.00 |
| Hartselle | 33,000.00 | 27,000.00 |
| Russellville | 69,000.00 | 56,454.00 |

18 Paragraph XIII.

Plaintiff is informed and believes and so alleges that the aforesaid plan to construct the said electricity systems as Federal Public Works Projects in said Towns for the purposes and objects hereinbefore alleged will immediately be carried out by PWA and the defendants herein, unless restrained, under the following arrangements:

The defendant Ickes and the said Towns have entered into pretended loan and grant agreements, which in effect provide that the defendant Ickes and his agents shall construct said electricity distribution systems in said Towns and finance said construction by granting outright to said Towns forty-five per cent of the cost of labor and materials employed in the construction of such systems, and by pretended lending to said Towns, by pretended purchase of their bonds, to be used for such financing and construction, the amounts heretofore alleged. Said grants will be pure gifts or bounties, designed solely to induce the Towns to enter into such arrangements and to insure the accomplishment of the wishes of PWA and these defendants with respect to the establishment of municipal facilities competing with and superseding the plaintiff. The said Towns have agreed in return that said funds will be made available to them upon requisition only in such amounts as defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of defendant Ickes is needed to complete the projects; that the proceeds of the "loans" and grants shall be deposited by the Towns in such banks as defendant Ickes chooses; that such proceeds shall be expended by the Towns only as defendant Ickes consents; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be according to the will of defendant Ickes; that all work on the projects shall be done under the regulation of defendant Ickes; that no contractor or subcontractor shall bid for or work upon

19

such projects without the approval of defendant Ickes; that all contractors and subcontractors shall be equipped with bonds and insurance as defendant Ickes desires; that said Towns shall engage in such litigation as defendant Ickes deems advisable with respect to irregularities, or defects, or illegalities in the bonds; that defendant Ickes may cancel the agreements with the Towns at any time he wishes, if in his opinion said Towns have unreasonably delayed in carrying out any of their duties; that the aforesaid funds shall be available to the Towns only subject to the power of defendant Ickes to withhold them if he deems the Towns' budgetary situations to be unsatisfactory, or if he is not satisfied that the Towns have complied with all provisions of the agreements; and that in other respects the will of defendant Ickes shall control the Towns' actions, even to the extent of the naming of the projects. It is further a part of said arrangements that the defendant Ickes, or his agents, will be permitted to fix, and from time to time to change, mimimum rates of pay and maximum hours for all persons employed on such construction, to enforce employment preferences in favor of ex-service men and others, to designate agencies through which workmen may be employed, to direct the use of human labor in place of machinery, to require disclosure to PWA of all information which PWA may desire with respect to such construction work, to require that all the disputes between the Towns and the contractors or subcontractors, and all labor disputes arising in connection with the construction, shall be submitted to the Board of Labor Review or other agency of PWA for final determination, and in other ways to regulate the construction of such distribution systems. It is a part of said arrangements that the Towns shall undertake to obtain any other funds deemed by defendant Ickes necessary to complete such systems, in the manner and from sources prescribed by defendant Ickes; to operate the systems upon completion and furnish electricity to consumers now being served by plaintiff; never to charge rates at a level more than a level approved by defendant Ickes; to pay from the general funds of the Towns, at current selling rate schedules, for energy used by the Towns themselves; and in other ways to submit to the will and regulation of defendant Ickes with respect to the operation of such systems. The said pretended bonds to be issued by

the Towns, through the purchase of which the pretended loans from PWA are to be made, are to be secured by a pledge of the earnings of the said electricity systems.

Paragraph XIV:

Plaintiff avers that its capital investment in properties located in the Towns is not less than the amounts herein set out, to wit:

| | |
|---|---|
| Guntersville | $90,000 |
| Hartselle | 70,000 |
| Russellville | 140,000 |

And a large portion of the balance of its capital investment in generating plants, transmission lines, substations and other machinery and equipment necessary in furnishing electric service to the Towns is allocable to the investment used and useful in furnishing such service.

Plaintiff avers that it has valid and subsisting contracts with each of said Towns for supplying such towns with electricity for schools, public buildings and other municipal purposes, and has valid and subsisting contracts with the inhabitants and industrial consumers in such Towns for supplying their demands for electricity. Plaintiff is informed and believes and therefore avers that each of such Towns, in the event such loans and grants are made, intend to breach its said contracts with plaintiff and take its requirements for electricity from such municipal project. Each of said Towns through its agents or servants has
21 solicited the patronage of plaintiff's other customers for the proposed municipal project and has secured written contracts with a large part of such customers, whereby the proposed municipal project will supply such customers' electric demands for a period of ten years. PWA has full knowledge of such intent and activity of the Towns and encouraged and conspired with the Towns thus to interfere with and procure the breach of plaintiff's contracts with such Towns and with the inhabitants thereof.

If the Towns of Guntersville, Hartselle and Russellville obtain municipal distribution systems to be operated in competition with plaintiff, plaintiff will be compelled either to suffer substantial and continuous losses in its operations in such Towns or to abandon entirely its property and sys-

tem therein, as shown by the fact that, instigated and directed by PWA, the agents or servants of each of the Towns have made a house-to-house canvass of plaintiff's customers in their respective Town, soliciting their patronage for the Town's proposed electric plant, and have reported to PWA that the project will not be competitive since practically all of plaintiff's customers have entered into contracts to purchase their electricity requirements from the proposed municipal projects as soon as service therefrom can be begun.

If defendants are permitted to consummate their unlawful projects in the Towns of Guntersville, Hartselle and Russellville, plaintiff is informed and believes and therefore states that they will undertake similar projects in many other cities and towns in the State of Alabama in which plaintiff is engaged in supplying electric public utility service, and construct a large number of municipal electric plants to be operated in ruinous competition with plaintiff.

As heretofore alleged the business of the plaintiff is made up of a combination of businesses done by it in
22 cities, towns, and rural areas in the State of Alabama as more particularly elsewhere alleged herein, all of which are connected with its system of transmission lines and served by its hydro generating plants. Each local business enables plaintiff better to serve the others and is incapable of withdrawal without substantial impairment of plaintiff's ability to serve the remainder of its customers. The withdrawal of a large number of these local businesses would substantially impair plaintiff's ability to continue operation as a going concern in that it would destroy, make useless, and cause to lie idle much of plaintiff's modern, efficient and valuable properties, including dams, steam plant, transmission lines, and distribution systems.

Paragraph XV.

The threatened action of the defendants herein pursuant to the aforesaid arrangements with the Towns of Guntersville, Hartselle and Russellville, is null and void and without warrant in law, and the defendants are wholly without authority to perform any of the acts which said arrangements contemplate to be performed by them, as herein alleged, because:

1. Paragraph (a) of the President's Executive Order of June 7, 1935 confers upon PWA only such powers as it possessed under Title II of the National Industrial Recovery Act. Section 202 thereof provides that the Administrator shall prepare a comprehensive program of public works. Section 203 provides that the Administrator may construct, finance, or aid in the construction or financing of any public works project "included in the program prepared pursuant to Section 202." PWA has announced that allotments are being and will be made before such a comprehensive program is prepared. In line with this policy allotments have been made in the absence of the preparation of such program, no such program has ever been prepared,

23 the allotments herein and the action of the defendants in financing and constructing the proposed plants and systems are being performed in the absence of the preparation of such a program, and the projects herein alleged for the Towns of Guntersville, Hartselle and Russellville, have never been included in any such program.

(2) The proposed loans to the Towns of Guntersville, Hartselle and Russellville are in violation of the requirement of Section 203 of the National Industrial Recovery Act as extended that such loans by the United States be reasonably secured. Such loans are not and cannot be reasonably secured, because the bonds of the Towns, on the faith of which said loans are to be made, are null and void because based upon undertakings of the Towns which violate the law of the State of Alabama, and any payment for them by the defendants is unauthorized by the National Industrial Recovery Act as extended:

(a) The Towns have surrendered to PWA and defendant Ickes absolute discretion to determine rates, rules and regulations for electric service to be furnished by such municipal electric distribution systems, to determine the depositories for their funds, the types of plants which shall be constructed, the materials to be used, the contractors and sub-contractors who shall perform the construction, the hours and wages of men working thereon, the place whence such men shall be hired, and in many other ways to determine and control the construction and operation of such plants, the costs thereof, the time within which they shall be completed, etc. Such a delegation of discretion to

PWA and defendant Ickes constitute an unlawful delegation of the sovereign duties of the aforesaid Towns to foreign agents in violation of the laws of Alabama, and constitutes a violation of the laws of Alabama with respect to competitive bidding.

(b) For reasons heretofore and hereafter set out, the contemplated grants and loans by PWA are invalid and therefore the Towns will be obligated immediately to refund to PWA the amounts of the grants and loans so illegally made and accepted by them, and the Towns
24 will thereby become indebted to PWA in violation of constitutional provisions of the State of Alabama with respect to the manner and the amounts of indebtedness which may be legally incurred by the Towns.

(c) The Towns have pledged the revenues from such municipal electricity systems to the payment of the issues of bonds and to the payment of other debts arising in connection with the construction of said systems in priority to the payment of general municipal expenses and the interest and principal on the general obligation bonds of the Towns now or hereafter outstanding, in violation of the laws of Alabama.

(3) The projects herein complained of are not authorized by the Emergency Relief Appropriation Act of 1935 or by the National Industrial Recovery Act as extended because they are not reasonably designed to provide relief, work relief or to increase employment by providing for useful projects. Plaintiff is informed, believes and so alleges that as such unemployment as exists in the aforesaid Towns or their vicinities, there is virtually none among persons who can be employed on projects of this sort. The projects will require almost altogether skilled workmen and have no reasonable relation to the unemployment situation in the Towns or their vicinities. Moreover, they will inevitably cause permanent unemployment of many, and perhaps eventually all, of those now in plaintiff's employ in said Towns.

(4) Said projects are not authorized by the Emergency Relief Appropriation Act of 1935 or by the National Industrial Recovery Act as extended because they are not of the type or character contemplated thereby.

(5) Said projects are not useful projects provided for in the Emergency Relief Appropriation Act of 1935 because

they are wholly useless and wasteful, in that they duplicate and destroy plaintiff's existing, adequate, reasonable and satisfactory system. The projects can result only in
25 disastrous rate wars, destructive of both plaintiff's facilities and the projects themselves. The small demand in said Towns can support only one utility. The additional projects will be not only useless but predatory, their effect will be to decrease, instead of to promote the fullest possible utilization of the present productive capacity of the electrical industry, and particularly that portion of the industry carried on by plaintiff.

(6) Said projects are not authorized by any law of the United States because the undertakings exacted from the Towns by PWA and defendant Ickes and the proposed construction and operation of the electricity systems will violate the law of the State of Alabama. Among other things, such undertakings constitute an unlawful delegation to foreign agents, these defendants, of the obligations of said Towns under the law of Alabama as alleged in Sub-paragraph (2) hereof.

(7) Said projects herein complained of are without warrant in any law of or in the Constitution of the United States, but the action of the defendants in furthering said projects is in violation of the Tenth Amendment to the Constitution of the United States, because:

(a) As heretofore alleged said projects are undertaken by the defendants solely for the express purpose of and pursuant to a publicly announced policy of controlling and lowering electricity rates within each State of the United States, and of making war upon creatures of the various States. Specifically, the projects threatened, as herein alleged, are designed solely to afford consumers within the Towns of Guntersville, Hartselle and Russellville with electricity rates at levels deemed by defendant Ickes and PWA to be "socially desirable" and to drive the plaintiff out of such Towns in accordance with the plan described in Paragraph XI hereof. Such action will in no manner affect interstate commerce; its effect is confined altogether to the inhabitants of said Towns, wholly within the State
26 of Alabama.

(b) Said projects are to be constructed and operated under the absolute direction and control of the defendants, even to their most minute details, in matters hav-

ing no relation to interstate commerce, and in a manner constituting usurpation of the local authority of the said Towns and assumption of control over their own affairs.

(8) In so far as any law of the United States or Executive Order of the President purports to confer upon said defendants, as officers of the United States, power to do any of the acts herein complained of, such law or order and said purported power are void and without warrant in the Constitution of the United States, but are in violation thereof because:

(a) Neither the Emergency Relief Appropriation Act of 1935 nor Title II of said National Industrial Recovery Act as extended nor any section thereof indicates any adequate legislative standard to guide these officers charged with the administration of said Title, but on the contrary seeks to delegate legislative power to the President and to such administrative officers in violation of Article I, Section 1; Article I, Section 8, Clauses 1; 2 and 18; and Article II, Section 1 of the Constitution.

(b) The funds of the United States available and to be used for the Projects herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such authority conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said projects will not promote the general welfare of the United States, but are exclusively for the local and private welfare of the consumers of electricity in said
27 Towns. Said projects will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful duplication of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary and incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manu-

facturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purpose would be merely for the private gain and profit of such manufacturers, sellers and contractors.

(c) Neither the Emergency Relief Appropriation Act of 1935 nor Title II of said National Industrial Recovery Act as extended nor any administrative regulation or procedure followed by PWA or the defendants in administering said Title provides for any method whereby persons whose rights will be injured and whose property will be taken by action of the defendants may be given an opportunity for full and adequate hearing; nor has this plaintiff been afforded any such opportunity, although the defendants herein threaten to take its property by virtue of unlawful and destructive competition and the threat thereof. Such denial of a hearing constitutes a violation of the due process clause of the Fifth Amendment of the Constitution.

Paragraph XVI.

Action by these defendants carrying out said arrangements with said Towns will aid and abet the Towns of Guntersville, Hartselle and Russellville in violating the law and Constitution of the State of Alabama, as herein more particularly alleged in Paragraph XV, subparagraphs (2) and (6), and will therefore be unlawful and void.

28 Paragraph XVII.

Plaintiff is informed and believes and therefore alleges, that the said Towns of Guntersville, Hartselle and Russellville and the said defendants herein are, in accordance with the aforesaid unlawful arrangements between PWA, defendant Ickes and the Towns combining and conspiring together and with each other to consummate their joint projects of constructing and operating said electricity plants and distributing systems and to injure the plaintiff, and will, unless restrained by this Court, immediately proceed so to do. Pursuant to such combination and conspiracy PWA and defendant Ickes have entered into the aforesaid pretended loan and grant agreements with said Towns and the other details of said arrangements. Said Towns will immediately present to defendant Ickes, or one or more of the defendants, officers of PWA, or their agents,

initial requisitions of money to be furnished pursuant to said agreements, and said defendants, or one of them, will, unless restrained by this Court, pay over to said Towns all or a large portion of the loan and grant of public funds of the United States as provided in said agreements, and will immediately direct the construction of said projects in accordance with the plan in Paragraph XI hereof alleged. Each and all of the foregoing threatened acts of said defendants will result in immediate and irreparable injury, loss and damage to plaintiff, as hereinafter more specifically alleged.

Paragraph XVIII.

If the defendants, or any of them, shall carry out the provisions of the said arrangements with the Towns, or do any or all of the acts threatened by them as hereinbefore alleged, the property right of plaintiff to enjoy its federal and municipal franchises free from injurious competition brought about by unlawful means and to conduct its business and charge rates free from interference and
29 domination by any agency of the federal government will immediately be invaded and destroyed; the value of the franchises and business of plaintiff in said Towns and of the tangible and intangible property acquired and used therein, and of the private funds invested and risked therein, represented by the capital stock and bonds of plaintiff, will immediately be greatly damaged and impaired, and finally rendered utterly worthless. It will immediately be impossible for plaintiff to obtain new customers or to increase the consumption of electricity by its present customers, but, on the contrary, plaintiff will immediately lose great numbers of its customers and must engage in a destructive rate war with the danger of being forced altogether to retire from business; furthermore, by reason of said unlawful projects, it will be impossible for plaintiff to sell or otherwise to dispose of its business and property save as junk and waste. The plaintiff, as a taxpayer to the United States will be specially injured as in this paragraph set forth, and will have been and in the future will be subjected to a deprivation of its property by taxation for a purpose without warrant in law or in the Constitution and in violation thereof. The plain-

tiff as a taxpayer to said Towns, Counties and State will be specially injured as in this paragraph alleged, and will have been and in the future will be subjected to a deprivation of its property by taxation for a purpose and in a manner without warrant in the laws or Constitution of Alabama or in the laws or Constitution of the United States and in violation thereof, and as such taxpayer its right that its municipal corporation shall not be forced to violate the law of the State of Alabama, and shall not enter into and be forced to carry out a relationship with others, specifically these defendants and PWA, who are without authority to enter into such a relationship, will be violated. By reason of all the foregoing allegations, the plaintiff, through unlawful interference with, injury to, and deprivation of its federal and municipal franchises, through unlawful deprivation of its property by taxation, and through unlawful deprivation and violation of its right that its municipalities shall not be forced to violate the law of Alabama and shall not enter into and be forced to carry out relationships with others who are unauthorized to enter into them, will suffer loss of its property without that due process of law guaranteed it by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States, and such injury and deprivation will constitute an immediate and irreparable loss, for which it has, and can have no adequate remedy at law.

Paragraph XIX.

In so far as plaintiff sues as a taxpayer of the United States, of the State of Alabama, and of the Counties of Morgan, Marshall and Franklin, or their subdivisions, or of the Towns of Guntersville, Hartselle and Russellville, it sues for all those persons similarly situated.

Paragraph XX.

The said Towns of Guntersville, Hartselle and Russellville and the members of their governing bodies are not made parties defendant hereto because they are without the jurisdiction of this court, and service of process cannot be had upon them in the District of Columbia.

Paragraph XXI.

Plaintiff alleges that it is futile to ask the said Towns to rescind their unlawful agreements and arrangements with defendant Ickes and PWA; plaintiff has repeatedly and constantly protested to the Towns the invalidity of such agreements and arrangements, substantially on the grounds herein set forth, but the Towns persist in their determination to consummate the said arrangements and the projects.

31 Paragraph XXII.

The said Towns have, as hereinbefore alleged, announced their intention to join with the defendants in the immediate consummation of the said projects, and plaintiff is informed and believes, and therefore alleges, that unless the defendants are immediately restrained from doing so, they will at once perform the acts herein complained of; plaintiff is further informed and believes, and therefore alleges, that the giving of notice of application for a restraining order would precipitate said unlawful acts and that said acts would do all the mischief complained of by the plaintiff herein and would result in immediate and irreparable injury, loss and damage to the plaintiff, whereas restraint of the doing thereof until disposition of plaintiff's application for a temporary injunction has been made would result in no detriment or injury to the defendants.

Wherefore, the premises considered, the plaintiff prays:

(1) That process issue against the defendants requiring them to answer this bill (but not under oath or affirmation, the benefit whereof is hereby expressly waived by the plaintiff).

(2) That this Court grant plaintiff a temporary restraining order against defendants, and each of them, enjoining each and all the defendants, their officers, agents and all persons acting in the aid of said defendants and their successors in office, from doing any act or thing to carry out any of the provisions of said unlawful arrangement with said Towns, and from, in any manner, aiding in the construction, or from financing the construction of said electricity generating and distributing systems in said Towns of Guntersville, Hartselle and Russellville; and, more spe-

cifically, from taking any steps to carry out any arrangement or agreement with the said Towns for the purpose of constructing or financing the construction of said electricity plant and systems in said Towns, from honoring any requisition and from transferring, lending, giving or dis-
32 bursing to the said Towns any funds whatsoever for said purpose, and from taking any step whatever designed to aid or facilitate the financing or construction of said plant and systems; such restraining order to be effective only until the matter of plaintiff's application for preliminary injunction shall be disposed of.

(3) That after notice and hearing, the Court enter a preliminary injunction to the same effect.

(4) And that upon final hearing, this Court enter a final order and decree to the same effect.

(5) And for such other and further relief as to the Court may seem meet.

ALABAMA POWER COMPANY,
By P. W. TURNER,
*Its Vice President.*

P. W. TURNER,
*Solicitor for the Plaintiff,*
*Birmingham, Alabama.*
EDWARD B. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
*Solicitors for the Plaintiff,*
*Union Trust Building,*
*Washington, D. C.*
NEWTON D. BAKER,
*Solicitor for Plaintiff,*
*Cleveland, Ohio.*

33 DISTRICT OF COLUMBIA, *ss:*

P. W. Turner, being duly sworn, deposes and says that he is Vice President of Alabama Power Company, a corporation organized under the laws of the State of Alabama, the plaintiff named in the above entitled cause, that he has authority to make this affidavit in behalf of said corporation, that he has read the foregoing bill of complaint by him subscribed and knows the contents thereof and that the statements therein made are true to his own knowledge except as to the matters therein stated to be alleged upon in-

formation and belief and as to those matters he verily believes the statements to be true.

P. W. TURNER.

Subscribed and sworn to before me this 14 day of October, 1935.

[SEAL.] T. C. MEIDINGER,
*Notary Public.*

34 *Order Dismissing Bill of Complaint.*

Filed October 15, 1935.

* * * * * * * *

This cause came on to be heard on the defendants' motion to dismiss the Bill of Complaint for want of equity, and the plaintiff having served notice of said motion and having been granted in open court leave to file an amended bill of complaint, and the bill having been filed and the parties having agreed that the said motion to dismiss should stand as to all the defendants against the amended Bill of Complaint, and this Court having heard the arguments of the parties thereon, and being fully advised in the premises,

Now, therefore, on motion of the defendants, it is this 14th day of October, 1935;

35 Adjudged, ordered and decreed that the motion of the defendants to dismiss the amended Bill of Complaint be and the same is hereby granted; and it is further

Adjudged, ordered and decreed that the amended Bill of Complaint be and the same is hereby dismissed, and it is further

Adjudged, ordered and decreed that the rule to show cause why a preliminary injunction should not be granted, heretofore made in this cause, is vacated.

Presented by:

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

No objection as to form.

DEAN ACHESON,
*Attorney for Plaintiff.*

(Sgd.) JESSE C. ADKINS,
*Justice.*

From the foregoing decree, the plaintiff, by its attorney, in open court, notes an appeal to the United States Court

of Appeals for the District of Columbia and the cost bond on appeal is hereby fixed at $100.00, or in lieu thereof a cash deposit of $50.00.

(Sgd.) JESSE C. ADKINS,
*Justice.*

36 *Order for Injunction.*

Filed October 15, 1935.

* * * * * * *

This cause having come on to be heard on the defendants' motion to dismiss the amended bill of complaint herein, and the said motion having been granted and the said bill having been dismissed and a decree entered, and the plaintiff having in open court noted an appeal from such decree, thereupon in open court the plaintiff moved the Court to issue an injunction during pendency of the appeal to restrain the defendants doing any of the acts alleged in the said amended bill of complaint. And the defendants having replied that the injunction prayed for should be modified,

Now, therefore, it is this 14th day of October, 1935, ordered that during the pendency of the aforesaid appeal, the defendants, Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, Horatio B. Hackett, Assistant Administrator thereof, J. J. Madigan, Acting Executive Officer thereof, F. E. Schnepfe,
37 Director of Projects Division thereof, Henry Morgenthau, Jr., Secretary of the Treasury of the United States, W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Disbursements Division of the Treasury of the United States, and each of them, their agents and all persons acting in aid of them and their successors in office, be, and they are hereby restrained from constructing or in any manner aiding in the construction of electricity generating and distributing systems in the municipalities of Guntersville, Hartselle or Russellville, State of Alabama, or from transferring, lending, giving or disbursing to the said municipalities any funds whatsoever of the United States for the purpose of constructing or financing the construction by the said municipalities of electricity generating and distributing systems

and from doing any act or thing for the purpose of effecting or bringing about the transfer, loan, gift or disbursement to said municipalities of any funds whatsoever for the said purpose; provided, that nothing in this order contained shall be construed to restrain said defendants or their agents pending this appeal from negotiating and entering into new contracts with said municipalities, or any of them, terminating any existing agreement with any of said municipalities and from making any new offer to any of said municipalities; and provided further that the plaintiff, Alabama Power Company, file herein an undertaking in the sum of Five Thousand Dollars ($5,000.00) with a surety to be approved by this Court and conditioned upon the payment of such costs and damages as may be incurred or suffered by any of said defendants who may be found to have been wrongfully enjoined or restrained hereby.

By the Court.

JESSE C. ADKINS,
*Justice.*

38 *Memoranda.*

October 15, 1935.—Injunction Undertaking $5000 approved and filed.

October 19, 1935.—$50 deposit in lieu of cost bond.

39 *Assignment of Errors.*

Filed October 21, 1935.

* * * * * * *

Now comes the plaintiff, and in its capacity as the owner of an electricity business with appendant franchise rights in the Towns of Guntersville, Hartselle and Russellville, Alabama, and as a taxpayer of the United States, as a taxpayer of the said Towns and of the Counties of Marshall, Morgan and Franklin and of the State of Alabama, and assigns as error the action of the Court in the following matters:

1. The Court erred in sustaining the motion of the defendants to dismiss the amended bill of complaint.

2. The Court erred in dismissing the amended bill of complaint.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
*Attorneys for Plaintiff.*

Received a copy of the foregoing assignment of errors this 19 day of October, 1935.

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

40 *Designation of Record.*

Filed October 21, 1935.

* * * * * * *

The Clerk will please prepare the record on appeal in the above entitled cause and include therein the following:

1. Memorandum: Bill of complaint, filed October 4, 1935.
2. Memorandum: Temporary restraining order. Bond fixed. Bond approved October 4, 1935.
3. Motion to dismiss bill of complaint, filed October 14, 1935, in full.
4. Amended bill of complaint, filed October 14, 1935, in full. Fiat.
5. Final decree entered October 15, 1935, in full, including notation of appeal and order fixing cost bond on appeal.
6. Order of October 14, 1935, continuing injunction pending appeal in full.
7. Memorandum injunction undertaking Five Thousand Dollars ($5,000.00) approved and filed.

41 8. Memorandum of deposit of Fifty Dollars ($50.00) in lieu of bond on appeal.

9. Assignment of errors.
10. This designation.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
*Attorneys for Plaintiff.*

The defendants have no additional designation.

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

42 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 41, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59671 in Equity, wherein Alabama Power Company, a corporation, is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of October, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
*Clerk,*
By CHAS. B. COFLIN,
*Assistant Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 6583. Alabama Power Company, a corporation, Appellant, vs. Harold L. Ickes, Administrator, et al. United States Court of Appeals for the District of Columbia. Filed Oct. 24, 1935. Henry W. Hodges, Clerk.

(7022-C)

271 Endorsed on cover: United States Court of Appeals for the District of Columbia. Filed Dec 14 1935. Henry W. Hodges, Clerk.

272 In the United States Court of Appeals for the District of Columbia

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No. 6583

ALABAMA POWER COMPANY, *Appellant*,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works, et al., *Appellees*.

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*Motion*

Now come the appellees and respectfully show to this Court:

I

That the decree, entered herein in the Supreme Court of the District of Columbia on October 14, 1935, and from which the present appeal was taken, dismissed the bill of complaint on the ground of insufficiency and on other similar grounds. The suit was brought to enjoin the defendants from advancing Public Works Administration funds to the towns of Guntersvile, Hartselle, and Russellville, Alabama, for the purpose of constructing an electric power plant.

273 For several weeks last past the municipalities have been negotiating with the Public Works Administration, and during the pendency of this appeal said negotiations culminated on December 4, 1935, in formal offers on the part of the Public Works Administration to the said municipalities the terms of which are vitally and substantially different than is alleged in the bill of complaint. Thus the pleadings do not now represent an actually existing controversy between the parties and it would be futile and useless to continue the litigation on the basis of them.

Copies of the aforesaid offers are hereto annexed and marked Exhibits 1, 2, and 3.

Wherefore, and for the reasons set forth in the annexed memorandum, the appellees move that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts above set forth and for a trial or other disposition of the cause on such amended pleadings.

JAMES W. MORRIS.

Exhibits 1, 2 and 3 referred to in the foregoing motion are not printed at this point because they respectively appear as Exhibits A, B, and C to the defendants' answer to the second amended bill of complaint at pp. 378, 398, 417, respectively infra.

*Counsel for the Federal Emergency Administration of Public Works.*

304 United States Court of Appeals for the District of Columbia

No. 6579

TEXAS UTILITIES COMPANY, *Appellant*,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; et al., Appellees.

Upon consideration of the motion of appellees that the above entitled cause be remanded to the Supreme Court of the District of Columbia in order that the pleadings may be reformed, it is, this 19th day of December, 1935, ORDERED that the cause be remanded to the Supreme Court of the District of Columbia with directions to set aside forthwith the final decree entered by that court dismissing the bill, but with leave to the defendants (appellees here) to file any further pleadings or to supplement and amend their present pleadings within ten days, and likewise with leave to the plaintiff (appellant herein) to amend

or supplement its bill of complaint within ten days thereafter; and that the parties shall then apply to the Supreme Court of the District of Columbia for an immediate trial on the merits.

Further ORDERED, by agreement and stipulation of the parties, that an injunction entered by the Supreme Court of the District of Columbia in this cause, and now in effect, shall continue in effect until the further order of this court.

Attest: GEORGE E. MARTIN, *Chief Justice.*

Endorsed: No. 6579. Texas Utilities Co., Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al. Order remanding cause &c. United States Court of Appeals for the District of Columbia. Filed Dec. 19, 1935 Henry W. Hodges, Clerk.

305 United States Court of Appeals for the District of Columbia

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No. 6580

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ALABAMA POWER COMPANY, *Appellant,*

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works, et al., *Appellees.*

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Upon consideration of the motion of appellees that the above entitled cause be remanded to the Supreme Court of the District of Columbia in order that the pleadings may be reformed, it is, this 19th day of December, 1935, ORDERED that the cause be remanded to the Supreme Court of the District of Columbia with directions to set aside forthwith the final decree entered by that court dismissing the bill, but with leave to the defendants (appellees here) to file any further pleadings or to supplement and amend their present pleadings within ten days, and likewise with leave to the plaintiff (appellant herein) to amend or supplement its bill of complaint within ten days thereafter; and that the parties shall then apply to the Supreme Court of the District of Columbia for an immediate trial on the merits.

Further ORDERED, by agreement and stipulation of the parties, that the injunction entered by the Supreme Court of the District of Columbia in this cause, and now in effect, shall continue in effect until the further order of this court.

Attest: GEORGE E. MARTIN, *Chief Justice.*

Endorsed: No. 6580. Alabama Power Company, Appellants vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al. Order remanding cause &c. United States Court of Appeals for the District of Columbia. Filed Dec. 19, 1935. Henry W. Hodges, Clerk.

306 United States Court of Appeals for the District of Columbia

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No. 6580

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ALABAMA POWER COMPANY, *Appellant,*

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; et al., Appellees.

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Per Curiam:

Appellees move this court to remand this cause to the Supreme Court of the District of Columbia with leave to the parties to amend their pleadings. The ground of the motion is that after the decree was entered in this cause in the Supreme Court of the District, and while the cause was pending on appeal, the Administrator of Public Works on December 2, 1935, entered into an agreement with the City of Sheffield, Alabama, and with other Alabama municipalities, with whom similar agreements had been made, terminating the former agreement relating to the subject matter of the suit; that subsequently on December 4, 1935, the Administrator entered into a new agreement with the City of Sheffield and with other Alabama municipalities, copies of which are filed with the motion.

We set the motion for hearing and have heard argument of counsel for and against the granting of the motion. We think we have the power to grant the motion if it should appear to be proper to do so. After consideration, we have concluded to grant the motion on the terms made part of our order.

307 The exhibits filed with the motion unmistakebly show that the agreement between the Administrator of Public Works and the municipalities involved, is essentially different from the agreement which the bill of complaint prayed should be enjoined. To ignore the situation thus brought about and to proceed to hear the cause on the present record would, as we think, be to do a futile act. The agreement which the bill of complaint sought to restrain the performance of, admittedly is not the agreement now in effect, and the conclusion of this court as to the validity or invalidity of that agreement would not be decisive of the validity or invalidity of the agreement which has now been made and substituted in its place. Nor would it settle the controversy.

The lower court issued a preliminary injunction on the filing of the bill and, notwithstanding it subsequently sustained a motion to dismiss the bill, retained the injunction in full force and effect. As our order on this motion will further continue the injunction order until the case is again brought here on appeal and is decided by us, or otherwise finally disposed of to the satisfaction of all parties, appellant will be fully protected; and the court below and this court, by the granting of the motion, will have the opportunity and the duty of deciding an existing, rather than a moot, controversy.

Endorsed: No. 6580, Alabama Power Company, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al. Per Curiam. Memorandum in support of order remanding cause &c. United States Court of Appeals for the District of Columbia. Filed Dec. 19, 1935, Henry W. Hodges, Clerk.

308 United States Court of Appeals for the District of Columbia

No. 6583

ALABAMA POWER COMPANY, *Appellant*,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works, et al., *Appellees*.

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Upon consideration of the motion of appellees that the above entitled cause be remanded to the Supreme Court of the District of Columbia in order that the pleadings may be reformed, it is this 19th day of December, 1935, ORDERED that the cause be remanded to the Supreme Court of the District of Columbia with directions to set aside forthwith the final decree entered by that court dismissing the bill, but with leave to the defendants (appellees here) to file any further pleadings or to supplement and amend their present pleadings within ten days, and likewise with leave to the plaintiff (appellant herein) to amend or supplement its bill of complaint within ten days thereafter; and that the parties shall then apply to the Supreme Court of the District of Columbia for an immediate trial on the merits.

Further ORDERED, by agreement and stipulation of the parties, that the injunction entered by the Supreme Court of the District of Columbia in this cause, and now in effect, shall continue in effect until the further order of this court.

Attest: GEORGE E. MARTIN, *Chief Justice*.

Endorsed: No. 6583. Alabama Power Company, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al. Order remanding cause &c. United States Court of Appeals for the District of Columbia. Filed Dec. 19, 1935, Henry W. Hodges, Clerk.

309 United States Court of Appeals for the District of Columbia.

April Term 1936

No. 6579

TEXAS UTILITIES, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DISBURSEMENTS DIVISION OF THE TREASURY OF THE UNITED STATES, APPELLEES.

No. 6580

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; JOHN J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DIVISION OF DISBURSEMENTS OF THE TREASURY OF THE UNITED STATES, APPELLEES.

310

No. 6583

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; JOHN J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DIVISION OF DISBURSEMENTS OF THE TREASURY OF THE UNITED STATES, APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

INDEX


| | Original | Print |
|---|---|---|
| Caption | | 202 |
| Memoranda: Bill of complaint for injunction and other relief filed; order of Court of Appeals remanding cause filed in Cause No. 58927 | 1 | 203 |
| Decree setting aside decree dismissing bill and granting leave to parties to file further pleadings | 2 | 203 |
| Answer to second amended bill of complaint | 3 | 204 |
| Exhibit A | 14 | |
| Amendment to second amended bill of complaint | 40 | 212 |
| Amendment to defendant's answer to the bill of complaint | 43 | 214 |
| 311 Memoranda: Bill of complaint for injunction filed in Cause No. 59071; order of Court of Appeals remanding cause filed in Cause No. 59071 | 44 | 215 |
| Decree setting aside decree dismissing bill and granting leave to parties to f'e further pleadings | 45 | 215 |

| | | |
|---|---|---|
| Third amended bill of complaint for an injunction and other relief | 46 | 216 |
| Exhibit "A" | 74 | 248 |
| Answer to third amended bill of complaint | 76 | 250 |
| Exhibit A | 88 | 259 |
| Exhibit B | 104 | 278 |
| Exhibit C | 120 | 297 |
| Exhibit D | 136 | 315 |
| Memoranda: Bill of complaint for an injunction and other relief filed in Cause No. 59671; order of Court of Appeals remanding cause filed in Cause No. 59671 | 152 | 333 |
| Decree setting aside decree dismissing bill and granting leave to parties to file further pleadings | 153 | 334 |
| Second amended bill of complaint for an injunction and other relief | 154 | 334 |
| Exhibit "A" | 181 | 366 |
| Answer to second amended bill of complaint | 183 | 368 |
| Exhibit A | 194 | 378 |
| Exhibit B | 212 | 398 |
| Exhibit C | 230 | 417 |
| Memorandum: Plaintiffs' motion to consolidate causes filed | 248 | 436 |
| Order consolidating causes | 248 | 437 |
| Pleadings, &c. in consolidated causes: | | |
| Opinion of Chief Justice Wheat | 249 | 437 |
| Defendants' proposed findings of fact | 260 | 447 |
| Conclusions of Law | 282 | 468 |
| Decree dismissing bills with costs; appeals noted by plaintiffs and undertaking for costs fixed | 286 | 472 |
| Memoranda: $50.00 deposited in lieu of cost bond on appeal in Equity Cause No. 58927; $50.00 deposited in lieu of cost bond on appeal in Equity Cause No. 59071 and $50.00 deposited in lieu of bond on appeal in Equity Cause No. 59671 | 287 | 472 |
| Assignment of Errors in Equity Cause No. 58927 | 288 | 473 |
| Assignment of Errors in Equity Cause No. 59071 | 301 | 482 |
| Assignment of Errors in Equity Cause No. 59671 | 313 | 491 |
| Order making Statement of Evidence part of record | 327 | 500 |
| 312 Designation of Record | 328 | 500 |
| Clerk's Certificate | 331 | 502 |
| Designation for printing | | 503 |

313 In the District Court of the United States for the District of Columbia.

No. 58927 In Equity.

TEXAS UTILITIES, a corporation organized and existing under the laws of the State of Texas, *Plaintiff*,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; J. J. MADIGAN, Acting Executive Officer thereof, et al, *Defendants*.

No. 59071 In Equity.

ALABAMA POWER COMPANY, a corporation, *Plaintiff*,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works, HORATIO B. HACKETT, Assistant Administrator thereof; J. J. MADIGAN, Acting Executive Officer thereof; et al, *Defendants*.

No. 59671 In Equity.

ALABAMA POWER COMPANY, a corporation, *Plaintiff*,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; JOHN HERRICK, Executive Assistant thereof, et al, *Defendants*.

314 BE IT REMEMBERED, That in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled causes, to wit:—

315 In the Supreme Court of the District of Columbia
Holding an Equity Court

No. 58927 In Equity.

TEXAS UTILITIES, a corporation organized and existing under the laws of the State of Texas, *Plaintiff*,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; J. J. MADIGAN, Acting Executive Officer thereof; F. E. SCHNEPFE, Director of Projects Division thereof; HENRY MORGENTHAU, JR., Secretary of the Treasury of the United States; W. A. JULIAN, Treasurer of the United States, and GUY ALLEN, Chief Disbursing Officer, Disbursements Division of the Treasury of the United States, *Defendants*.

*Memoranda.*

June 24, 1935.

Bill of Complaint for an injunction and other relief, filed.

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December 30, 1935.

Order of Court of Appeals remanding cause, filed.

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316 *Decree Setting Aside Decree Dismissing the Bill and Granting Leave to Parties to File Further Pleadings.*

Filed Dec 30 1935.

* * * * * * * * * * *

Upon consideration of the order of the United States Court of Appeals for the District of Columbia entered December 19, 1935, and this day filed in the above entitled cause, remanding said cause to this Court with directions to set aside the final decree entered by this Court dismissing the bill, with leave to the defendants to file any further pleadings or to supplement and amend their present pleadings within ten days, and with leave to the plaintiff to amend or supplement its bill of complaint within ten days thereafter; it is by the Court this 30th day of December, 1935,

ADJUDGED, ORDERED and DECREED, That the decree of this Court entered on October 14, 1935, dismissing the bill of complaint as amended, be, and the same is hereby, set aside and vacated; and it is further

ADJUDGED, ORDERED and DECREED, That the defendants be, and they are hereby, granted leave to file any further pleadings or to supplement and amend their present pleadings within ten days from this date; and that the plaintiff be, and it is hereby, granted leave to amend or supplement its bill of complaint within ten days thereafter.

F. DICKINSON LETTS
*Justice*

No objection as to the form of the above decree.

DEAN G. ACHESON.
*Attorney for Plaintiff*

ALEXANDER HOLTZOFF
*Special Assistant to the Attorney General.*

---

317 *Answer to Second Amended Bill of Complaint*
Filed Jan. 9, 1936

* * * * * * * * * * *

Come now Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; J. J. Madigan Acting Executive Officer thereof; F. E. Schnepfe, Director of Projects Division thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States,; W. A. Julian, Treasurer of the United States; and Guy Allen, Chief Disbursing Officer Division of Disbursements, Treasury Department of the United States; defendants in the above entitled cause, and each of them, and for answer to the second amended bill of complaint, say:

I.

These defendants are informed that plaintiff is a corporation incorporated under the laws of the State of Texas, but are without knowledge as to any of the other allegations contained in Paragraph I of the bill of complaint.

II.

Defendants Harold L. Ickes, Horatio B. Hackett, J. J. Madigan and F. E. Schnepfe (hereinafter referred to Jointly as "the PWA defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them.

Defendants Henry Morgenthau, Jr., W. A. Julian,
318 and Guy F. Allen (hereinafter jointly referred to as "the Treasury defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them, except that they deny that the Treasurer is in control of the disbursement of public funds of the United States, and aver that he is in control only of the payment of checks drawn upon him and that with certain minor exceptions not applicable to the instant situation, he has no control over the drawing of such checks.

III.

These defendants are advised that the allegations contained in Paragraph III are conclusions of law which they are not required to answer, but if construed to be averments of fact, they deny each and every allegation thereof.

IV.

These defendants are without knowledge as to any of the allegations contained in Paragraph IV of the bill of complaint and demand strict proof thereof.

V.

The PWA defendants say that they are without knowledge as to the allegations of Paragraph V of the bill of complaint and demand strict proof thereof.

The Treasury defendants admit that plaintiff is a taxpayer of the United States, but say that information as to the amount of taxes paid, and of tax liability incurred must be obtained from other offices, that the necessary steps to secure such information has been taken, but that, as yet, these defendants are without knowledge as to the accuracy of the amounts set out in Paragraph V of the bill of complaint.

319 VI.

These defendants are without knowledge as to any of the allegations contained in Paragraph VI of the bill of complaint, and demand strict proof thereof.

## VII.

The PWA defendants deny each and every allegation contained in Paragraph VII of the bill of complaint.

Further answering the allegations of such paragraph, said defendants say that they are engaged in administering the provisions of Title II of the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935; that by the terms of Title II of the National Industrial Recovery Act of 1933, the Federal Emergency Administrator of Public Works, under the direction of the President, is directed to prepare a comprehensive program of public works, and with a view to increasing employment quickly, while reasonably securing any loans made by the United States, (1) to construct, finance, or aid in the construction or financing of any public works project included in such program, and (2) upon such terms as the President shall prescribe, to make grants to states, municipalities or other public bodies for the construction, repair or improvement of any such projects provided that no grant shall exceed 30 per centum of the cost of the labor and materials employed upon the project.

That upon the adoption of said Act, applications were received from states, municipalities and other public bodies throughout the United States for aid in financing the construction of a large variety of useful public projects, including, among others, air ports, tunnels, bridges, hospitals, jails, swimming pools, streets and highways, water works, sewage and drainage systems, and electric generating, transmission and distribution systems; that all such applications have been carefully examined for the purpose of determining whether the application is authorized by law, and whether the project meets the requirements of the Act of Congress above referred to; that after such examination, the Federal Emergency Administrator of Public Works, with the approval of the President, has included in the comprehensive program of public works many thousands of useful public projects, and has approved of loans or grant, or both, to aid in financing the construction thereof, having first determined that each such loan or grant meets the requirements of Title II of the National Industrial Recovery Act, and Executive Orders of the President pursuant thereto, and will effectuate the purposes of said Act.

Said defendants further say that the projects included in such comprehensive program have not been limited to a particular section of the country, the comprehensive program being national in scope; that the projects have not been limited to any particular type or class, but have been greatly diversified; that defendants have not solicited, urged, or induced the construction of any particular type of useful public project, but have acted only at the instances and request of municipalities concerned; that where application is made for a loan or grant, or both, to finance or aid in financing the construction of a project which will involve competition between a municipality and a privately owned utility company, the Administrator has taken the position that it was the intention of Congress that the question of whether such competition is desirable should be left entirely to the municipality concerned; that where a grant only is made the Administrator has not given any consideration to the question of rates to be charged by the municipality; that where, as here, a loan is made to be re-
321 paid out of the revenues of the project and not out of local taxes, the Administrator, in determining whether the loan is reasonably secured, has considered the prospective earnings of the project, and solely for that purpose, the rates which the municipality proposed to charge; that the loan and grant to the City of Plainview was made pursuant to the policy outlined herein; that the sole aim and desire of these defendants is to carry out the mandate of Congress as set forth in the statutes herein referred to.

These defendants further allege that their activities under and pursuant to said statutes and executive orders have resulted in a vast increase in employment and an improvement in the national prosperity, including, among other things, a vast improvement in the credit of municipalities, an increase in the value of municipal bonds and a consequent increase in the assets of national banks and other financial institutions throughout the United States.

The Treasury defendants deny the allegations contained in the concluding sentence of Paragraph VII of the bill of complaint, and say that they are without knowledge as to the remaining allegations contained in Paragraph VII and demand strict proof thereof.

VIII.

The PWA defendants admit that an application was made by the City of Plainview, Texas, for a loan and grant to aid in financing the construction of a municipal electric plant and distribution system, and that a loan and grant in the sum of $423,346. for such purpose has been approved by the Administrator and the President.

Said defendants deny that such loan and grant was made pursuant to any alleged plan of regulating and con-
322 trolling intra-state rates, or of bargaining with utility companies for a reduction in rates, but allege that the loan and grant referred to herein was made pursuant to the policy of the PWA outlined in Paragraph VII of the answer.

Said defendants further say that Otto M. Rau is no longer employed by or connected with the Federal Emergency Administration of Public Works; that no offer or agreement and no record or reference to any offer or agreement on the part of said Rau to the effect that if the plaintiff would reduce and adjust its rates in a specified manner PWA would disapprove the Plainview municipal electric project appears in the correspondence, papers and documents on file with the PWA, but on the contrary the correspondence shows that plaintiff's rate reduction was entirely voluntary; that if the said Rau purported to make any such offer or agreement, he acted entirely without authority, and the defendants are without knowledge thereof.

Said defendants further deny that plaintiff has not been afforded an opportunity to be heard, and allege that plaintiff has been afforded an opportunity to present its objections to the proposed project, in person and in writing, on numerous occasions, and that plaintiff's objections were given careful consideration.

Said defendants deny each and every allegation of Paragraph VIII of the bill of complaint except as specifically admitted or qualified herein.

The Treasury defendants say that they are without knowledge as to any of the allegations of Paragraph VIII of the bill of complaint, and demand strict proof thereof.

## IX.

The PWA defendants admit that they entered into a loan and grant agreement with the City of Plainview,
323 Texas, whereby they agreed to aid the City in financing the construction of a municipal electric plant and distributing system; said defendants further allege that in August, 1935, the United States Circuit Court of Appeals for the 8th Circuit held, in the case of *Arkansas-Missouri Power Co.* v. *City of Kennett*, 78 F. (2d) 911, that a contract similar to the Plainview agreement was invalid under Missouri law because certain provisions thereof constituted an improper delegation of legislative power on the part of the municipality. While the correctness of that opinion seemed doubtful, particularly in its application outside the State of Missouri, it was nevertheless deemed advisable to execute a new agreement eliminating the objectionable features of the old. During the month of November, 1935, it was mutually agreed between the City of Plainview and these defendants that the previous contract be terminated and an offer for a unilateral contract be substituted in its place. Subsequently an examination of the decisions of certain United States District courts in similar cases indicated that it was desirable to make certain changes in this new form of contract to conform to these decisions. As a result, the agreement of November, 1935, was terminated by mutual consent and a new agreement, dated December 4, 1935, entered into between the parties, a true and correct copy of which is appended hereto, marked "Exhibit A" and by this reference made a part hereof.

Said defendants further say that all of the conditions of the loan and grant are contained in the offer of December 4, 1935 (Exhibit A); and that there are no conditions, express or implied, except as set forth therein; that all previous contracts and agreements have been terminated, and that there are no contracts or agreements, oral or written, between the parties, except as set forth in Exhibit A.

The PWA defendants admit that, unless restrained, they will proceed with the loan and grant in accordance
324 with the terms of the offer (Exhibit A) but deny all other allegations of Paragraph IX of the bill of complaint, except as expressly admitted or qualified herein.

The Treasury defendants deny each and every allegation contained in Paragraph IX in so far as it pertains to them, except they admit they will, unless restrained, honor vouchers duly and regularly drawn by the defendant Ickes, or his duly constituted subordinates, on moneys appropriated by Congress; and say that they are without knowledge as to any of the other allegations contained in said Paragraph, and demand strict proof thereof.

X.

The PWA defendants say that they are without knowledge as to the terms of any existing contracts between the City and the plaintiff, and demand strict proof thereof; they deny all other allegations contained in Paragraph X of the bill of complaint.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph X and demand strict proof thereof.

XI.

The PWA defendants deny each and every allegation of fact contained in Paragraph XI of the bill of complaint.

The Treasury defendants deny each and every allegation of fact contained in Paragraph XI in so far as it pertains to them; and specifically answering subparagraph (9) (b), say that the funds of the United States are not so allocated that borrowed moneys can be distinguished from other moneys in the Treasury; and these defendants say that they are without knowledge as to any other allegation of fact contained in said paragraph and demand strict proof thereof.

XII.

These defendants deny each and every allegation
325 of fact contained in Paragraph XII of the bill of complaint.

XIII.

The PWA defendants admit that, unless restrained, they will make a loan and grant to the City of Huntsville, in accordance with the terms of the offer (Exhibit A), but deny all other allegations of Paragraph XIII of the bill of complaint.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, upon funds appropriated by Congress; they deny each and every remaining allegation contained in Paragraph XIII insofar as it pertains to them and say that they are without knowledge as to any allegations of said paragraph insofar as they pertain to other defendants, and demand strict proof thereof.

XIV.

The PWA defendants deny each and every allegation of fact contained in Paragraph XIV of the bill of complaint.

The Treasury defendants say that they are without knowledge as to any of the facts contained in Paragraph XIV and demand strict proof thereof.

XV.

These defendants are advised that Paragraph XV of the bill of complaint consists of conclusions of law which they are not required to answer, but, if construed as averments of fact, deny each and every allegation thereof.

XVI.

These defendants admit that the City of Plainview and the members of its governing body are without the jurisdiction of this Court and that service of process cannot be had upon them in the District of Columbia.

326 The PWA defendants further admit that suit was instituted by plaintiff in the District Court of the United States for the Northern District of Texas, against the City and defendant Ickes and that such suit was dismissed on motion of the City Attorney, but said defendants are without knowledge as to the other allegations of Paragraph XVI of the bill of complaint.

The Treasury defendants are without knowledge as to the allegations of the bill of complaint relating to the suit in the United States District Court for the Northern District of Texas, and demand strict proof thereof.

XVII.

These defendants are without knowledge as to any of the allegations in Paragraph XVII of the bill of complaint and demand strict proof thereof.

XVIII.

The PWA defendants admit that, unless restrained, they will comply with the term of the offer (Exhibit A) but, except as expressly admitted herein, deny each and every allegation of fact contained in Paragraph XVIII of the bill of complaint.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendants Ickes, or his duly constituted subordinates, on moneys appropriated by the Congress, but deny each and every other allegation of fact, pertaining to them, contained in Paragraph XVIII of the bill of complaint.

WHEREFORE, the premises considered, these defendants jointly and severally pray that the bill of complaint be dismissed, with proper costs and charges.

JAMES W. MORRIS

Exhibit A, referred to in the foregoing answer, is not printed at this point because it appears as Exhibit F to the stipulation between the Texas Utilities Company and the defendants here, which stipulation appears at p. 167 of the Statement of Evidence herein, the said Exhibit appearing at p. 197 thereof.

*Counsel for Federal Emergency Administration of Public Works.*
*Attorneys for Defendants.*

354 *Amendment to Second Amended Bill of Complaint*

Filed April 9, 1936

* * * * * * * * *

Now comes the plaintiff and by leave of court files this its amendment to its second amended bill of complaint herein. The following amendment is to be inserted at the beginning of Paragraph VII of the said second amended bill of complaint:

The plaintiff is informed, believes and so alleges that, commencing in 1933, the President of the United States announced and undertook the execution of a permanent "national power policy" to make electricity "more broadly available at cheaper rates to industry, to domestic and to

agricultural consumers", to effectuate Federal regulation of rates for the intrastate generation, distribution and sale of electricity ,to establish Federal regulation and control over matters of policy and service in connection with intrastate electric utilities and to promote and bring about public ownership or cooperative ownership of facilities for the generation, transmission and distribution of electricity in intrastate commerce.

355 In furtherance of said "national power policy", the Federal Government has established great Federally owned power projects as "yardsticks" by which to measure cost of electricity and to regulate intrastate rates and charges for electricity and has established or utilized various additional agencies such as PWA, TVA and the Rural Electrification Administration. Such agencies have been and are actually engaged in carrying out various phases of said "national power policy". The campaign hereafter in this Paragraph described is in furtherance of and is part and parcel of said "national power policy".

TEXAS UTILITIES COMPANY
By HOWARD C. WESTWOOD
*Attorney for Texas Utilities Company*

356 DISTRICT OF COLUMBIA, *ss:*

**Howard C. Westwood**, being duly sworn, deposes and says that he is one of the attorneys for the Texas Utilities Company, that Texas Utilities Company is a corporation organized under the laws of the State of Texas and that said corporation and its officers are absent from the District of Columbia; that he is informed that the statements made in this amendment, upon information and belief, are statements of fact of which said officers have been informed and believe, and from information obtained from said corporation and its officers, he verily believes the facts stated in the amendment to be true.

HOWARD C. WESTWOOD

Subscribed and sworn to before me this 2nd day of April 1936.

PAUL J. ROBERTSON,
*Notary Public, D. C.*

My commission expires May 15, 1937.

357 *Amendment to Defendants' Answer to the Second Amended Bill of Complaint*

Filed April 20, 1936

* * * * * * * * *

Now come the defendants, and by leave of court file this amendment to their answer to the second amended bill of complaint.

The following amendment is to be inserted in Paragraph VII of said answer:

"The defendants deny each and every allegation of the amendment to Paragraph VII of the second amended bill of complaint."

JAMES W. MORRIS
*Assistant Attorney General*
ALEXANDER HOLTZOFF
*Special Assistant to the Attorney General*
JOHN W. SCOTT
*Special Assistant to the Attorney General*
JEROME N. FRANK
*Counsel for Federal Emergency Administration of Public Works*
*Attorneys for Defendants*

358 IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 59071 in Equity

ALABAMA POWER COMPANY, a Corporation, *Plaintiff*

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; JOHN HERRICK, Executive Assistant thereof; JOHN J. MADIGAN, Acting Executive Officer thereof; F. E. SCHNEPFE, Director of Projects Division thereof; HENRY MORGENTHAU, JR., Secretary of the Treasury of the United States; W. A. JULIAN, Treasurer of the United States, and GUY ALLEN, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States,

*Defendants.*

MEMORANDA

July 24, 1935. Bill of Complaint for Injunction, filed.
December 30, 1935. Order of Court of Appeals remanding cause, filed.

359 *Decree Setting Aside Decree Dismissing the Bill and Granting Leave to Parties to File Further Pleadings.*

Filed Dec. 30, 1935

* * * * * * * * * *

Upon consideration of the order of the United States Court of Appeals for the District of Columbia entered December 19, 1935, and this day filed in the above entitled cause, remanding said cause to this Court with directions to set aside the final decree entered by this Court dismissing the bill, with leave to the defendants to file any further pleadings or to supplement and amend their present pleadings within ten days, and with leave to the plaintiff to amend or supplement its bill of complaint within ten days thereafter; it is by the Court this 30th day of December, 1935,

ADJUDGED, ORDERED and DECREED, That the decree of this Court entered on October 14, 1935, dismissing the bill of complaint as amended, be, and the same is hereby, set aside and vacated; and it is further

ADJUDGED, ORDERED and DECREED, That the defendants be, and they are hereby, granted leave to file any further pleadings or to supplement and amend their present pleadings within ten days from this date; and that the plaintiff be, and it is hereby, granted leave to amend or supplement its bill of complaint within ten days thereaffer.

F. DICKINSON LETTS, *Justice*

No objection as to the form of the above decree.
DEAN G. ACHESON, *Attorney for Plaintiff*
ALEXANDER HOLTZOFF, *Special Assistant to the Attorney General.*

360 *Third Amended Bill of Complaint for an Injunction and Other Relief*

Filed March 2, 1936

* * * * * * * * *

Now comes the plaintiff, and by leave of Court files this its amended bill of complaint, and for its causes of action against the defendants alleges:

*Paragraph I*

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, is a resident and citizen of the State of Alabama, and has its principal office and corporate domicile in the City of Attalla, Alabama, and sues in its own right.

*Paragraph II*

The following defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found within the District of Columbia, and are more particularly identified as herein specifically set forth:

HAROLD L. ICKES is the duly appointed, qualified, and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the
361 United States of America dated July 8, 1933, in pursuance of the provisions of Section 201(a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act".

HORATIO B. HACKETT is the duly appointed, qualified, and acting Assistant Administrator of PWA.

JOHN HERRICK is the duly appointed, qualified, and acting Executive Assistant of PWA.

JOHN J. MADIGAN is the duly appointed and qualified Acting Executive Officer of PWA.

F. E. SCHNEPFE is the duly appointed, qualified, and acting Director of Projects Division of PWA.

HENRY MORGENTHAU, JR. is the duly appointed, qualified, and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. JULIAN is the duly appointed, qualified, and acting Treasurer of the United States and, as such, is under the supervision of the Secretary of the Treasury, in control of the disbursement of the public funds of the United States.

GUY ALLEN is the duly appointed, qualified, and acting Chief Disbursing Officer of the Treasury Department and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual drawing and issuing of checks on behalf of the United States, and the actual disbursements of the public funds of the United States.

Each of the foregoing officers or employees is sued on account of acts which he threatens to perform under the pretended authority of Title II of the National Industrial Recovery Act as extended by section 12 of the Emergency Relief Appropriation Act of 1935 and paragraph (a) of the President's Executive Order of June 7, 1935.

*Paragraph III*

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

*Paragraph IV*

Plaintiff institutes and brings this suit in its several capacities as a citizen and property owner lawfully engaged in business, as the owner of real and personal property and franchises and as a federal, state, county and municipal taxpayer sustaining special damages and special tax burdens peculiar to it and not sustained by taxpayers generally. Plaintiff's said business, property and franchises will be irreparably injured, damaged or destroyed unless the relief herein prayed for is granted with the result that plaintiff will suffer direct pecuniary loss amounting to many thousands of dollars, all as hereinafter more particularly set forth.

362

*Paragraph V*

Plaintiff is a taxpayer of each of the Cities of Decatur, Florence, Sheffield and Tuscumbia, Alabama, and of the Counties in which such Cities are located, and with respect

to its hereinafter mentioned electrical properties and operations in each of said Cities has paid to said Cities and said Counties many thousands of dollars in taxes in the past, and for the twelve months ended December 31, 1934, has paid or incurred the liability to pay such taxes as indicated in the following table:

| *City or Town* | *Tax Paid* | *County* | *Tax Paid* |
|---|---|---|---|
| Decatur | $6,082.46 | Morgan | $10,070.71 |
| Florence | 5,319.20 | Lauderdale | 4,305.52 |
| Sheffield | 5,350.60 | Colbert | 12,713.72 |
| Tuscumbia | 1,912.95 | Colbert | 12,713.72 |

Plaintiff is likewise a taxpayer of the State of Alabama, and with respect to its electrical properties and operations in said State has paid to said State many thousands of dollars in taxes in the past, large portions of which sums are paid back by the State to the various communities, including the four Cities aforesaid, to be expended by such communities for their municipal purposes; and for the twelve months ended December 31, 1934, plaintiff has paid, or incurred the liability to pay, such taxes to the State in excess of the sum of Nine Hundred Thousand Dollars ($900,000.00). Plaintiff has incurred the liability to pay taxes to the Cities, the counties, the State, and other political subdivisions, for the current tax year 1935, in approximately the same amounts as paid and incurred for the year 1934, as aforesaid.

*Paragraph VI*

Plaintiff is a taxpayer of the United States, and with respect to its electrical properties and operations in the State of Alabama, including the properties and operations in each of the aforesaid cities, has paid to the United
363 States many thousands of dollars in taxes in the past; and under the provisions of an Act of Congress, approved June 16, 1933 (48 Stat. 254, 256), for the period ended January 1, 1936, has paid, or incurred the liability to pay to the United States excise taxes in the sum of Two Hundred Seventy Thousand Dollars ($270,000.00) and has incurred the liability to pay to the United States similar taxes for the current year of 1935.

*Paragraph VII*

Plaintiff alleges that by its charter it has the right to manufacture, supply and sell to the public electric energy produced either by steam or by water as a motive force, or by both, for lighting, heating, power and other purposes. Plaintiff now owns and operates electric public utility properties, serving the public in sixty-five of the sixty-seven counties of the State of Alabama. These properties consist of hydro-electric and of steam generating plants, of high tension transmission lines, of distribution lines, and all equipment and facilities necessary for use in generating, transmitting, distributing, metering and delivering electric energy to meet the demands of electricity consumers in the State of Alabama.

Plaintiff is now serving, directly and indirectly, approximately two hundred thousand (200,000) customers within said State, and its gross electrical revenue received therefrom in 1934 was approximately Fifteen Million Dollars ($15,000,000). Plaintiff's system is an integrated whole coordinated so as to anticipate future needs and growth of the communities in the State of Alabama, and represents intensive application of the economies of large-scale, integrated power development. The loss of substantial numbers of its customers in any particular locality would materially impair the benefits to it and its customers derived from such integration.

Plaintiff's system is modern and efficient and in all respects equipped to furnish the public in Alabama with electricity service according to the most advanced standards of electrical engineering. The capacity of its electric plants is adequate to furnish more than the present demand upon it for electricity within said State, a capacity ample to supply all additional uses and users which may reasonably be foreseen in the future.

Among other communities served by said system are the City of Decatur, County of Morgan, the City of Florence, County of Lauderdale, and the Cities of Sheffield and Tus-
cumbia, County of Colbert. These cities are located
364 in close proximity to each other in the northwestern
portion of the State of Alabama, and together form a vital link in the plaintiff's system in that region. The following table indicates the approximate population of

each of said cities, the approximate number of customers served by plaintiff therein, and the gross revenues of plaintiff from its electrical operations therein for the twelve months ended December 31, 1934:

| City | Approximate Population | Approximate Number of Customers | Gross Revenues of Plaintiff from such electric operations for year ending December 31, 1934 |
|---|---|---|---|
| Decatur | 15,593 | 3,247 | $240,300.55 |
| Florence | 11,729 | 2,284 | 170,580.44 |
| Sheffield | 6,221 | 1,291 | 93,783.54 |
| Tuscumbia | 4,533 | 928 | 44,281.44 |
| | 38,076 | 7,750 | $548,945.97 |

*Paragraph VIII*

The plaintiff's system, including that portion represented by the aforesaid four cities and the customers therein, is served almost entirely by plaintiff's hydro-electric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, which was constructed by authority of an Act of Congress (34 Stat. 1288), whereby plaintiff was granted a license to build a dam across said river, a navigable water of the United States, at the location named, for the improvement of navigation on such river and the development of the water power inherent therein; and Mitchell Dam and Jordan Dam, likewise on the Coosa River in Alabama; and Martin Dam on the Tallapoosa River in Alabama, which latter three dams were constructed under licenses from the Federal Power Commission, authorized by the Federal Water Power Act (41 Stat. 1063). In granting such licenses the Federal Power Commission found:

1. That each of such dams on the Coosa River were necessary and convenient for the development and improvement of navigation and utilization of power therein;

2. That such dams were best adapted to a comprehensive scheme of development and utilization of such waterways for such purposes;

3. That said Tallapoosa River was a non-navigable stream and that the impounding and the release of the

waters of such river would benefit navigation on the Alabama River, a navigable stream, formed by the junction of the Tallapoosa and Coosa rivers;

4. That there was a market in Alabama for the power output of such plants;

5. That such dams are justified in the public interest.

Under and by such Act of Congress and such licenses, plaintiff was required to expend large sums in preparing certain portions of the Coosa River bed for future
365 navigation to and through such dams and in the building of piers in the streams to form ultimate navigation guides to such locks; and, in addition, so to construct such dams that locks could be erected therein as and when the United States determined to complete the navigation from one pool level to the next; by the terms of the Coosa River licenses, the licensee was required to permit of discharge through its dams, free of cost to the United States, of such part of the flow of the river necessary for the purpose of such lockage and to install such lights, signals, and power for the operation of such navigation structures as might be installed in the future by the United States; and with respect to Lay Dam, the plaintiff is required to convey to the United States a right of way around the end of such dam, and by the subsequent licenses issued to the plaintiff under which Mitchell Dam was erected, the plaintiff was required to make such excavations and perform such other channel work to complete a passage way from the lock around Lay Dam to the pool level created by Mitchell Dam as might be necessary; and in connection with all such work plaintiff spent a large amount of money and has obligations in connection with the future use of such facilities and locks for navigation purposes in a sum that is not capable of present ascertainment. Under and by virtue of such licenses, plaintiff was required also to make such installations in the Coosa and Tallapoosa river projects as the Federal Power Commission should deem necessary from time to time to supply adequately the reasonable market demands of the public. Such hydroelectric projects on the Coosa and Tallapoosa were built at a cost to the plaintiff of an amount in excess of $60,000,000. The completion of such projects on the Coosa River created contiguous slack water pools of 57 miles in length, and when

such pools are connected by locks placed in the aforementioned dams such pools will afford a nine-foot depth navigation on such river for a distance of 49 miles.

Plaintiff in good faith accepted the licenses from the Federal Power Commission and built Mitchell and Jordan Dams, resulting in the creation of navigable features of the Coosa River as set out above, and in the improvement of the navigable features of the Alabama River, all with the agreement and understanding under the Federal Water Power Act and the licenses issued to plaintiff thereunder that the plaintiff would secure, as the consideration moving to it for the investment in excess of $60,000,000 made under the licenses so issued, the right and privilege freely to serve the market in Alabama with electric energy.

366 *Paragraph IX*

Plaintiff is authorized by the laws of the State of Alabama to construct, own, operate, and maintain its plant facilities and systems in each of the municipalities in which it renders electric service, including Decatur, Florence, Sheffield and Tuscumbia.

On October 16, 1919 the City of Decatur granted to plaintiff a thirty-year electric franchise, the effectiveness of which was conditioned upon plaintiff's connecting its system in such city and its hydro-electric transmission system within a period of three years. On January 27, 1920 plaintiff made this connection and on such date such franchise became effective for a period of thirty years, is now in full force and effect, and will not expire until January 27, 1950.

In the year 1902 the Cities of Florence, Sheffield and Tuscumbia each granted plaintiff's predecessor in interest an electric franchise. Such franchises were validly assigned to this plaintiff in 1925. By their terms the franchises so granted by the Cities of Sheffield and Tuscumbia expired in October, 1932 and the franchise granted by the City of Florence expired in March, 1933. Since the expiration of these franchises plaintiff has continued to supply the Cities of Florence, Sheffield and Tuscumbia and the inhabitants thereof with electric service and during such period has paid to these cities annual licenses and privilege taxes for the operation of an electric utility and has sold to these cities electric light and power for lighting the streets and

public buildings and other public places therein. These three cities have given plaintiff no notice to cease the use of the streets, alleys, and other public places in supplying them and their inhabitants with electric light and power and have given no notice to plaintiff to remove its poles and wires from the streets, alleys, and other public places therein, but have continued to utilize plaintiff's facilities and to receive and avail themselves of plaintiff's service.

Plaintiff is the only person, firm or corporation engaged in supplying electric light and power to the Cities of Florence, Sheffield and Tuscumbia and their inhabitants and is the only person, firm or corporation now able to supply electric light and power to such cities and their inhabitants.

*Paragraph X*

The plaintiff's properties, plants, lines, and other facilities are modern and efficient and the plaintiff is
367 equipped to and does render efficient and adequate electric utility service in all the municipalities and rural districts in which it operates, including the aforesaid four cities, and possesses facilities of adequate capacity to continue the rendition of such type of service for a considerable time in the future without substantial additions thereto.

The rates for sale of electric power and energy of the plaintiff and the character of its service in the State of Alabama are subject to regulation of and are regulated by the State of Alabama through its Public Service Commission; and the rates now in effect in the territory served by the plaintiff in the State of Alabama and in the four cities aforesaid are rates approved as reasonable by, and placed in effect pursuant to order of, the Alabama Public Service Commission.

*Paragraph XI*

Plaintiff alleges that its electricity business in the aforesaid four cities is conducted pursuant to valid and subsisting franchise privileges granted to it by the Government of the United States through the Act of Congress and the licenses of the Federal Power Commission referred to in Paragraph V, and by the aforesaid four cities, as alleged in Paragraph VI.

In reliance upon their franchise rights plaintiff and its predecessors have over a long period of years established and operated, and plaintiff now owns and operates the aforesaid services as a going business in such cities, with many customers and business contacts, financial credit and reputation acquired, established, developed and expanded at great expense and at the risk of the private investment of funds by the holders of its various securities.

The plaintiff is enjoying, and for many years has enjoyed, the good-will of its customers in the State of Alabama, including the aforesaid cities. The plaintiff has, and at all times prior hereto has had, ample facilities and is and has been ready and willing to serve any and all customers within the entire territory served by plaintiff's utility systems. The inhabitants of Alabama, and particularly of the Cities of Florence, Sheffield, Tuscumbia and Decatur, are, and for many years prior hereto, have been ready, willing and desirous of using the service of plaintiff. The good relations between the plaintiff and its customers represents one of its most valuable assets. The plaintiff is rendering, and for many years prior hereto has been rendering,
high class, efficient, dependable service at reasonable
368 rates, and except for the acts of the defendants
hereinafter specified, there is every reasonable probability that the friendly business relationships existing between it and its customers in Alabama, and particularly in the Cities of Florence, Sheffield, Tuscumbia and Decatur, will continue indefinitely on the same satisfactory basis which now exists and which has existed for many years past with mutual satisfaction and profit to the plaintiff and its customers.

*Paragraph XII*

As hereinafter more fully appears, plaintiff is informed and believes and therefore avers that said defendants Ickes, Hackett, Madigan and Schnepfe (hereinafter together referred to as the PWA defendants) acting in concert with another agency of the Federal Government, to-wit Tennessee Valley Authority (hereinafter sometimes called TVA) and/or its directors, officers, agents and representatives some time in the year 1933 informed a plan unlawfully to disrupt the good relations existing between plaintiff and

its customers and to invade and destroy the property, business and business relationships of plaintiff in the preceding paragraph described, and conspired and unlawfully agreed together and have ever since so conspired and agreed, by and through unlawful means, including unlawful use of public funds of the U ited States by PWA to take unlawfully from plaintiff its business, rights and property by destroying the same so far as possible or rendering them useless wholly or to a great but unascertainable degree and greatly impairing, if not wholly destroying the value thereof. Said defendants are now and for some time have been proceeding unlawfully to induce, finance and cause the construction of an electric distribution system in said cities, and the operation thereof in competition with plaintiff in the sale of electricity in said cities and elsewhere, where the plaintiff is now lawfully engaged in its business.

*Paragraph XIII*

Commencing in 1933, the President announced and undertook the execution of a permanent "national power policy" to make electricity "more broadly available at cheaper rates to industry, to domestic and to agricultural consumers", to effectuate Federal regulation of rates for the interstate generation, distribution and sale of electricity, to establish Federal regulation and control over matters of policy and service in connection with intrastate electric utilities and to promote and bring about public ownership or cooperative ownership of facilities for the gen-
369 eration, transmission and distribution of electricity in intrastate commerce.

In furtherance of said "national power policy", the Federal Government has established great Federally owned power projects as "yardsticks" by which to measure cost of electricity and to regulate intrastate rates and charges for electricity and has established or utilized various additional agencies such as PWA, TVA and the Rural Electrification Administration. Such agencies have been and are actually engaged in carrying out various phases of said "national power policy".

In particular, sometime in 1933, after the passage of the National Industrial Recovery Act, the PWA defendants

and particularly the defendant Ickes, acting pursuant to and in furtherance of this "national power policy", conceived and have since been executing throughout the United States a plan, scheme or policy to promote public ownership and operation of local intrastate electric utilities regardless of local state policy and to regulate and fix the rates at which privately-owned intrastate electric utilities should serve the public in the various states and thereby to extend Federal control over matters of intrastate commerce and local police power. The plan is not intended to have and in fact does not have any relation to interstate commerce. Its intended and actual effect is control and regulation of entirely local and intrastate commerce and matters of state police power.

It has been carried out through the promulgation by PWA defendants of a policy of constructing with federal funds local intrastate electric utilities under the claim of authority so to do in the National Industrial Recovery Act or in the Emergency Relief Appropriation Act of 1935 and to the end of regulation of intrastate electric rates through direct federal competition and federally-subsidized competition regardless of whether existing rates were and are established by state authority and were and are reasonable or unreasonable.

In the United States generally, the plan and purpose of the PWA defendants is effected by inducing and persuading the municipalities and other political subdivisions in the various states to conspire and act in concert with the PWA defendants in the accomplishment of their illegal purposes and in the unconstitutional and illegal disbursement of public monies of the United States by joint action in carrying out as Federal Public Works Projects the construction of electric generating and distributing plants and systems within such subdivisions planned, built and
370 financed under the control and direction of the PWA defendants and to be operated in such manner as from time to time directed by the PWA defendants. Such projects, when undertaken, are carried out in such manner that the political subdivisions which are nominally to construct and operate the projects are mere dummies in such construction and operation under the control, direction and domination of the PWA defendants.

In applying this plan in the states generally, the PWA defendants usually threaten private electric utilities in particular locations with the construction of such project with federal monies unless such private utilities agree to establish rates satisfactory to the PWA defendants. The rates so to be established usually demanded by the PWA defendants are arbitrary, unreasonable and non-compensatory. If the private utility threatened with direct federal competition or federally-subsidized competition through the establishment of such project accedes to the demands of the PWA defendants, the project is usually abandoned. If the threat is disregarded, the PWA defendants go forward with the project without regard to the extent of unemployment in the particular location or elsewhere, the relation between employment given by such project and the character of the workers unemployed, the dependability and economic soundness of the existing private utility, the capacity of the location to absorb the increased electricity produced or other considerations relating to the need for such project, all of which are excluded entirely or given no substantial consideration by PWA defendants in reaching a decision to construct and operate the project.

To induce the necessary concert of action by the political subdivisions in the various states and to procure their consent to such Federal Works Projects, PWA defendants by advertising and other newspaper publicity and by circulars and by direct statements which have been and are being made to the political subdivisions of the several states by the PWA defendants offer to meet the entire cost of such projects by outright gifts of thirty per cent., and more recently, of forty-five per cent. of the cost of the project and by pretended loan of the balance of the cost repayable by its terms only out of the net revenues from the operation of the project so that no financial risk whatever will be incurred by the political subdivision. In the construction and operation of the proposed project either by express contract or by requirements of compliance with general rules, regulations and conditions imposed by the PWA defendants, little, if any, discretion is vested in the particular subdivision with respect to the details

371 of the construction thereof or of the subsequent operation. Arrangements made by the PWA defendants for the construction and operation of such a project constitute a pretense and sham in that they do not in fact provide for a real loan of monies but merely for the possible recapture of part of the cost of the project out of the net revenues, if any, from its operation, and impose no obligation upon the particular political subdivision and confer no authority upon it in the construction of the project. By express or implied threats of competition with such federally-subsidized projects, the PWA defendants have sought and continue to seek a regulation by them of intrastate electric utility rates and a general and purely arbitrary lowering of intrastate electric utility rates.

This plan is frankly acknowledged by PWA defendants in public press releases and public statements of the defendant Ickes, public offers made generally throughout the several states to their political subdivisions, in instructions given to the agents of PWA charged with the administration of their affairs, in negotiations with existing private utilities and otherwise. Among other instances, said plan was publicly set forth in Press Release No. 989 under date of September 17, 1934, a copy of which is attached hereto and marked Exhibit "A".

In the Tennessee Valley states, and particularly in the State of Alabama, the general plan of the PWA defendants above set forth has been varied by concert of action with TVA, its directors, agents and representatives in such a fashion as to provide, secure and exercise Federal control over intra-state local distribution rates for electric light, heat, and power through TVA rather than directly by PWA. Specifically PWA has induced and coerced the aforesaid Cities of Florence, Sheffield, Tuscumbia and Decatur to enter into agreements with TVA whereby TVA fixes and determines the rates and charges which said cities will make for the electricity produced at the contemplated projects. Said agreements are a part of the "national power policy" hereinabove referred to and are intended and designed to further the establishment of federally controlled "yardsticks" to measure the cost of electricity and to regulate intrastate rates and charges for electricity. This design and purpose is illustrated by the telegram dis-

patched by defendant Ickes from Washington, D. C., under date of July 11, 1934 to Hon. Lee Glenn, Mayor of Florence, Alabama. Said telegram read as follows:

378 "Washington D C
1934 July 11

Hon. Lee Glenn
Mayor, Florence, Ala.

Lilienthal TVA has explained proposal to communities North Alabama whereby Authority will purchase distribution facilities Florence and other communities from Alabama Company, rehabilitate them and turn them back to communities. Also your proposal amend your application such manner Florence purchases existing facilities and uses PWA funds for rehabilitation and extensions. Lilienthal informs me that all other communities in area affected have approved TVA plan, that Florence alone is holding out. Policy Public Works is to support TVA. Its proposal furthers regional operation rural electrification pursuant to President's desire, whereas your proposal impedes that policy. This Administration will advance no funds to Florence for expenditures inconsistent TVA plan. It will aid entire region and in our judgment is highly advantageous to you. However allotment and grant will be maintained and pending completion transaction between TVA and Alabama Company. Suggest you promptly take appropriate action accept TVA proposal so that it may exercise option within effective period.

ICKES, ADMINISTRATOR."

In this area PWA defendants have likewise, and in concert with TVA, its directors, officers, agents and representatives, pursued the unlawful purpose and design of regulation by federally-subsidized competition of intrastate electric utility rates and of fostering a policy of public ownership of intrastate electric utilities.

*Paragraph XIV*

The aforesaid four cities, moved by the actions and inducement alleged in Paragraph XIII, through their respective mayors, filed with PWA applications for Federal

Public Works Projects consisting of electric distributing systems to be owned by said cities, respectively.

While the procedure pursued by PWA, defendant Ickes and his agents in passing upon such applications does not provide for a hearing from those whose property and rights will be injured or destroyed through the authorization and construction of such municipal systems, plaintiff requested and sought a hearing before PWA relative to said applications of the aforesaid cities. Plaintiff has, however, constantly been denied the privilege of such hearing. Nevertheless, plaintiff filed with PWA a written protest against the approval of the applications of said cities, except in the case of the City of Florence. Such protest set out in substance the facts heretofore and hereafter alleged in this bill. There is no further board, agency or official of the United States to whom plaintiff may apply to prevent the consummation of the projects in said cities. Consequently,
plaintiff has exhausted all administrative remedies
373 which it could possibly have to prevent such action.

Notwithstanding plaintiff's protests of the applications aforesaid, plaintiff is informed, believes and avers that such protests were given no consideration whatsoever by PWA, but that, for no purpose other than that of driving down plaintiff's rates and destroying plaintiff's business in accordance with the plan of PWA aforesaid, *and upon findings* that the action of PWA would in fact destroy and drive out plaintiff's business in said cities, PWA approved such Public Works Projects for said cities, to be carried out under pretended loan and grant agreements with the cities at the times and in the amounts set out hereafter, the funds to be used in the erection and construction, as Federal Public Works Projects under the direction and control of PWA, of complete electric distribution systems in the cities to serve the same parties and purposes as are now served by plaintiff therein. The amounts proposed to be granted to the cities are equal to thirty per cent. of the cost of labor and materials to be employed in the construction of such electric distribution systems. The pretended loans and grants plaintiff alleges, upon information and belief, to be of the approximate amounts set out as follows:

| City | "Loan" | Grant |
|---|---|---|
| Decatur | $268,000 | $82,000 |
| Florence | 336,000 | 100,000 |
| Sheffield | 187,000 | 43,000 |
| Tuscumbia | 105,000 | 25,000 |

*Paragraph XV*

Plaintiff is informed and believes and so alleges that the aforesaid plan to construct the said electric systems as Federal Public Works Projects in said cities for the purposes and objects hereinbefore alleged will immediately be carried out by PWA and the defendants herein, unless restrained, under the following arrangement:

The defendant Ickes and the said cities have entered into pretended "loan and grant agreements", which, in effect, provide that the defendant Ickes and his agents shall construct said electricity distribution systems in said cities and finance said construction by granting outright to said cities thirty per cent. of the cost of labor and materials employed in the construction of such systems, and by the pretense of lending to said cities, by pretended purchase of their bonds, to be used for such financing and construction, the amounts heretofore alleged. Said grants will be pure gifts or bounties, designed solely to induce the cities to enter into
374 such arrangements and to insure the accomplishment of the wishes of PWA and these defendants with respect to the establishment of municipal facilities competing with and superseding the plaintiff. The said cities have agreed in return that said funds will be made available to them upon requisition only in such amounts as defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of PWA is needed to complete the projects; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be according to the will of PWA; that all contractors and subcontractors shall be equipped with bonds and insurance as PWA desires; that defendant Ickes may cancel the agreements with the cities at any time he wishes, if in his opinion said cities have unreasonably delayed in carrying out any of their duties; that the aforesaid funds shall be available to the cities only subject to the power of defendant

Ickes to withhold them if he deems the cities' budgetary situations to be unsatisfactory, or if he is not satisfied that the cities have complied with all provisions of the agreements; and that in other respects the will of defendant Ickes shall control the cities' actions. It is further a part of said arrangements imposed by PWA that in the construction of such projects the city or the contractor:

(1) Shall pay a minimum wage to be fixed by law or ordinance;

(2) Shall give preference in employment to ex-service men;

(3) Shall exclude convicts from working on such project;

(4) Shall work no laborer thereon more than eight hours in any one day or more than thirty hours in any one week;

(5) Shall pay each employee on said project in full each week, without deduction of lawful set-offs against such debt;

(6) Shall give the employee on the project the right to organize and bargain collectively free from interference and discrimination because of union affiliations;

(7) Shall report to PWA and other governmental agencies the number of persons on the payroll, rate of wages and the man hours;

(8) Shall be subject to the pains and penalties of Public Act No. 324 (48 Stat. 948) and the rules and regulations promulgated thereunder.

The said pretended bonds to be issued by the cities, through the purchase of which the pretended loans from PWA are to be made, are not general obligations of the cities, but it is expressly understood and agreed between said cities, respectively, and PWA that said bonds shall not constitute an indebtedness of said cities within the
375 meaning of any provision or limitation of the Constitution of the State of Alabama and shall never impose a pecuniary liability upon said cities or charge against their general credit. Said pretended bonds are payable solely from the revenue to be derived from said projects.

*Paragraph XVI*

While the applications of the aforesaid cities for such projects were pending before PWA, plaintiff undertook to negotiate with the cities for the sale to them of its properties located therein. Plaintiff offered to sell to the City of Decatur its distribution system located therein with all its customers attached, for the sum of $359,000, which plaintiff alleges was far below what said properties and business were worth. This offer was declined by said city, said city stating that the availability of a PWA loan and grant would not make it worthwhile for the city to make such a purchase. Plaintiff likewise offered to sell to the City of Florence its distribution system therein with all its customers attached, for the sum of $195,000, which said sum was much less than the properties and business were worth. The City of Florence also declined to make such purchase because of the availability of the loan and grant from PWA.

Plaintiff offered to sell to the City of Sheffield its distribution system located therein, with all its customers attached, for the sum of One Hundred Sixty-four Thousand Dollars ($164,000.00), which said sum is much less than such properties and business were worth. The City of Sheffield likewise declined said offer. It admitted that said offer was reasonable, but in view of the availability of the PWA grant insisted that plaintiff allow it a discount of 30 per cent. of the reasonable value of such properties. Plaintiff offered to sell to the City of Tuscumbia its distribution system located therein, with all its customers attached, at the price of One Hundred Four Thousand Dollars ($104,000.00), which said sum is much less than such properties and business were worth. The City of Tuscumbia likewise declined said offer. It admitted that said offer was reasonable, but in view of the availability of the PWA grant insisted that plaintiff allow it a discount of 30 per cent. of the reasonable value of such properties.

*Paragraph XVII*

Each of the Cities of Florence, Sheffield, Tuscumbia and Decatur is in default in the payment of either the
376 principal and interest or the interest on its presently outstanding, matured, and past due obligations,

and there is no market for the pretended income obligations of said cities described in Paragraph XV in the general financial markets or in any special financial markets, and except for the proposed acts of the defendants, the said cities would be unable to secure monies for said purposes.

*Paragraph XVIII*

The proposed projects of the PWA defendants with the said cities are not for a national or other public purpose for the following reasons:

(1) There is no need for the construction of an electric distribution system in said cities since any and all possible need for electric energy and service in each of said localities is now, and for a long time past has been, and will continue to be, fully and adequately provided by private capital and enterprise and by means of capital invested in and represented by plaintiff's existing plant and equipment, which it operates as a public utility subject to the laws of the State of Alabama.

(2) The proposed projects are solely local projects confined to the area in which they are to render electric services and solely for the local and private welfare and benefit of the consumers of electricity in said area and are not and cannot be for the purpose of serving or providing any benefit for the general public of the United States, and will not and cannot promote the general welfare of the United States. The projects will, if anything, be to the general detriment of the United States by reason of creating unnecessary and wasteful duplication of electric distribution facilities and causing unemployment and loss of invested capital.

(3) The expenditure of federal funds for such projects can inure, if at all, only to the private benefit of the consumers of electricity in and about said cities and such cities in their private and commercial capacities, and said expenditures are solely and purely for private purposes.

(4) The only possible further benefit which could be served or promoted by the expenditure of federal funds for the proposed projects is the private and individual benefits to manufacturers and producers of material, equipment and electrical appliances to be purchased, acquired and con-

structed thereby, and to the builders, contractors and providers of labor to be expended in the assembling and construction thereof, and if any secondary or ultimate or incidental benefit should result from the stimulation of industry and increase of profits in the manufacture, sale, assembly, transportation and installation of materials entering into the construction of said property, the same will be merely a secondary, remote and contingent benefit, and the expenditure of public funds for such purposes will constitute a disbursement and expenditure for the private gain and profit of such manufacturers, sellers and contractors.

*Paragraph XIX*

The federal funds employed in making loans and grants for the construction of municipal or publicly owned utilities, and particularly the funds to be employed for the proposed loan and grant to the aforesaid cities, are largely, if not wholly, monies borrowed on the credit of the United States.

377 *Paragraph XX*

The threatened action of the defendants herein pursuant to the aforesaid arrangement with said cities (including particularly the threatened loan and grant and disbursement of public funds of the United States and delivery thereof to said cities for the purposes and uses herein set out) is illegal and unauthorized by, and contrary to, the terms and purposes of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the defendants are wholly without authority in law to perform any of the acts which said arrangements with the said cities contemplate to be performed by them as herein alleged, because:

(1) Section 202 of the National Industrial Recovery Act as extended provides that the Administrator shall prepare a comprehensive program of public works. Section 203 provides that the Administrator may construct, finance, or aid in the construction or financing of any public works project "included in the program prepared pursuant to Section 202". PWA has announced that allotments are being and will be made before such a comprehensive program is prepared. In line with this policy, allotments have been made in the absence of the preparation of such program, no such program has ever been prepared, the allot-

ment herein and the action of the defendants in financing and constructing the proposed plants and systems are being performed in the absence of the preparation of such a program, and the projects herein alleged have never been included in any such program. The only program ever prepared is the sum of particular projects which PWA has, from time to time, determined to carry out; this is not the preparation of a program under Section 202, but is a mere catalogue of action taken without any such program.

(2) Said projects are not reasonably designed for, or capable of, increasing employment quickly. Plaintiff avers that the amount of employment which will be given by the construction of said proposed distributing system and transmission lines will be small and temporary, wholly out of proportion to the enormous sum contemplated to be expended and to the tremendous loss and injury to plaintiff's business and property. Indeed such construction will cause, by its inevitable impairment and possible destruction of the plaintiff's operations and business in said cities, the unemployment of many and possibly all of those now engaged in plaintiff's operations and business in said cities.

(3) Section 202 of the National Industrial Recovery Act, as extended, by particularly enumerating, in the list of Public Works for which public monies might be loaned and granted, the following, "development of water power" and "transmission of electrical energy", has excluded from the projects included in said act, electrical plants and systems other than water power and electricity transmission systems, such as the plants and systems contemplated by said projects. Neither said provision nor any other provision of said section authorized a publicly-owned distribution system of this sort. Furthermore the purported authority to make a grant such as that contemplated, expired on June 16, 1935, by virtue of Section 201 (d) of said Act, and such purported authority was not extended by the Emergency Relief Appropriation Act of 1935. Nor does such Act of 1935 authorize a project of this type. Among other things, this project, as heretofore alleged, will not be self-liquidating.

(4) Said pretended loans are not repaid and cannot be reasonably secured since they are to be repaid only from, and secured only by, the net earnings of the projects, which will be wholly insufficient to pay operating expenses. Said

projects are wholly useless and wasteful in that they duplicate plaintiff's existing, adequate systems, and be-
378 cause they are uneconomic and unsound in that independent systems cannot be maintained save at exorbitant rates, if at all, in said cities, due to the small number of possible customers. The projects can result only in disastrous rate wars, destructive of both plaintiff's facilities and the projects themselves. The small demand in each of said cities can support only one such utility. The additional projects will be not only useless but predatory; their effect will be to decrease, instead of promote the fullest possible utilization of the present productive capacity of the electrical industry, and particularly that portion of the industry carried on by plaintiff.

No unusual emergency has arisen which necessitates the making of a grant by PWA for the construction of a publicly-owned electrical plant and system at Florence, Sheffield, Tuscumbia and Decatur, Alabama. The conditions with respect to the rendition of electrical service in such cities are now the same as they have been for a number of years in the past, except that substantially lower rates for such service have been made effective in recent years, and material improvements in the facilities for furnishing such service has been made. Plaintiff is adequately supplying all demands for electrical service in such cities.

(5) Said proposed and contemplated arrangements would violate the laws of the State of Alabama in that the undertakings assumed or proposed to be assumed by the said cities under said arrangements would, if carried out, constitute an unlawful delegation to foreign agents of their sovereign duties. More specifically, the cities propose to surrender to these defendants complete control of the terms, manner and purpose of expenditure, the regulation of the construction and the cost thereof, the regulation of the type of labor to be used thereon, choice of contractors, laborers and other agents, the selection and approval of materials and the regulation of labor costs thereon, the regulation of rates to be charged for electricity service, and other matters, at the same time leaving to the defendants the determination of whether said funds shall be withheld and the projects remain uncompleted, and said cities would otherwise delegate to the PWA defendants their responsi-

bilities, duties, and power in respect to the construction, financing and operation of said plants and distribution systems.

Furthermore, the law of the State of Alabama will be violated in that the grants and loans by PWA are, for reasons heretofore and hereafter set out, invalid and therefore the cities will be obligated immediately to refund to PWA the amount of the grants so illegally made and accepted by them and the cities will thereby become indebted to PWA in violation of statutory provisions of the State of Alabama with respect to the manner and amounts of the indebtedness which may be legally incurred by the cities.

(6) Said proposed and contemplated arrangements provide or will provide by their terms for the supervision, control and direction of many things by PWA subsequent to June 30, 1937, whereas PWA by law is continued in any event, if at all, only until June 10, 1937.

(7) Said projects are undertaken by the defendants along with other similar projects for the express purpose of controlling and lowering intrastate electricity rates within each state of the United States, of fostering a policy of public ownership of intrastate electric utilization in the United States.

(8) Said projects are specifically designed to impair the value of plaintiff's property, franchises and rights by selling electricity to municipalities and customers now served by plaintiff in Alabama.

(9) No provision of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935 or of any other law of the United States authorizes any part of such funds to be loaned or granted to said cities for the acquisition of real estate or rights of way for such distribution systems or transmission lines as are contemplated. Plaintiff is informed and believes and therefore avers that it is proposed and planned that said cities shall use substantial amounts from said funds for the acquisition of such real estate and rights of way.

(10) Neither the National Industrial Recovery
379 Act, nor the Emergency Relief Appropriation Act of 1935, nor any other Act of Congress, authorizes the making of loans and grants to finance competitive proj-

ects, destructive to lawful private industry already established and adequately serving the public. The result of the construction of the proposed projects will be to interfere with, instead of to "promote the fullest possible utilization of the present productive capacity of industries," as required by Section 1 of the National Industrial Recovery Act. The making of loans and grants for such projects, as herein contemplated, tends to increase unfair competitive practices instead of to "eliminate unfair competitive practices" as required by said Section. Competitive projects are likewise contrary to the rules prescribed by the President of the United States under the National Industrial Recovery Act, as set forth in PWA Circular No. 1, which provides that "projects for the transmission of electric energy into territory not now served" will be preferred for grants.

(11). No provision of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, or of any other law of the United States, authorizes the PWA defendants to undertake such projects (as they are doing), for the express purpose of controlling and lowering intrastate electricity rates within each state of the United States without reference to the reasonableness of existing rates and fostering a policy of public ownership of intrastate electric properties in the United States.

(12) The grant and loan of Federal moneys to said political subdivisions, under the conditions, penalties, threats and coercion herein set forth, is an attempt by the PWA defendants to acquire for the Federal Government control over matters of a purely intrastate nature, forbidden to it by the Federal Constitution, through the device, expedient and indirect means of contractually requiring the vesting of such control in the Federal Government as a condition of the making of such grants and loans.

*Paragraph XXI*

If and to the extent that said National Industrial Recovery Act as extended and/or said Emergency Relief Appropriation Act of 1935 be held in terms to confer upon said defendants or any of them, or upon any officer of the United States power to do any of the acts or things herein complained of, said acts, said purported power, and said

actions and things attempted to be done in reliance thereon are unlawful, unconstitutional and void for the following reasons:

(a) Neither of said Acts nor the actions and things attempted to be done in reliance thereon are authorized by any power delegated to the Federal Government by the Constitution;

(b) The National Industrial Recovery Act as extended and the Emergency Relief Appropriation Act of 1935 severally attempt to extend Federal power over matters of intrastate commerce and State police power, including the regulation of intrastate public utilities, in contravention of the Ninth and Tenth Amendments to the Federal Constitution and constitute the taking of plaintiff's property in violation of the Fifth Amendment to the Federal Constitution;

(c) Neither Title II of the National Industrial Recovery Act as extended, nor any section thereof, nor said Emergency Relief Appropriation Act of 1935, nor any section thereof, indicates any standard to guide those officers charged with the administration of said Acts, but on the contrary both delegate legislative power to the President and, under said Acts and to effectuate their purposes, the President is permitted and does redelegate such legislative power to PWA, and said Act permits and authorizes the President and PWA to promulgate such rules and regulations, having the effect of law, as will in his judgment best provide for the general welfare, all violative of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; and Article II, Section 1 of the Constitution of the United States;

(d) Section 12 of the Emergency Relief Appropriation Act of 1935 purports to delegate to the President of the United States the purely legislative function of determining what, if any, functions conferred upon PWA by the National Industrial Recovery Act shall be performed by PWA after June 16, 1935. PWA is an authority purported to be constituted by Act of Congress with functions specified and defined by such Act of Congress expiring, by the provisions of said National Industrial Recovery Act, June 16, 1935. Said Section 12 of the Emergency Relief Appropriation Act of 1935 seeks unlawfully to delegate the legislative power of Congress to specify the powers, authority and

duties of its own creature, PWA, to the President without indicating any adequate legislative standard to guide the President in the determination of what powers, authority and duties shall be vested in PWA after June 16, 1935, in violation of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; and Article II, Section 1 of the Constitution. Accordingly, any and all acts by PWA, its officials, employees and agents, including defendant Ickes and the other defendants herein who are officials of PWA, are without warrant in law and illegal;

(e) Neither Title II of the National Industrial Recovery Act, as extended, nor any section thereof, nor said Emergency Relief Appropriation Act of 1935, nor any section thereof contains any definite appropriation by the Congress of the United States of any funds to be granted or "loaned" to the said cities for the construction of electric distribution systems or electric transmission lines or any standard to guide those officers charged with the administration of said laws in the determination that each of said cities is a party or one of a class of parties for whose benefits an appropriation for any such purpose or purposes was made by the Congress and said laws and each of them delegates legislative power to select the subject of appropriations and the beneficiaries of the appropriations to the President, and under said laws, and to effectuate their purpose the President is permitted to, and does redelegate such legislative power to PWA in violation of Article I, Section 1; Article I, Section 9, Clause 7; and Article II, Section 1 of the Constitution of the United States;

(f) Neither Title II of said National Industrial Recovery Act as extended, nor said Emergency Relief Appropriation Act of 1935, nor any Administrative regulation or procedure followed by PWA or the defendants in administering said Title provides for any method whereby persons whose rights will be injured and whose property will be taken by the actions of the defendants may be given an opportunity to be heard, and plaintiff has not been afforded any opportunity to be heard although the defendants herein threaten to take its property and said Acts and the actions taken thereunder by the defendants for that reason deny due process of law as a matter of procedure in violation of the Fifth Amendment to the Federal Constitution.

(g) If the said pretended loans and grants of funds are made to the cities as aforesaid, the plaintiff will be deprived of its property without due process of law and its property will be taken without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

(h) If it be that these defendants seek and find some purported authority in the Emergency Relief Appropriation Act of 1935 further than that granted in Paragraph (a) of the President's Executive Order of June 7, 1935,
381 any such further authority is baseless and void for the reasons heretofore set out.

(i) The funds of the United States available and to be used for the Projects herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such authority conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said projects will not promote the general welfare of the United States, but are exclusively for the local and private welfare of the consumers of electricity in said Cities. Said projects will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful duplication of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary and incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manufacturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purposes would be merely for the private gain and profit of such manufacturers, sellers and contractors.

(j) Each of said Acts in contravention of the Ninth and Tenth Amendments to the Federal Constitution, attempt to abridge the rights of plaintiff, its officers, employees and security holders, to earn a livelihood, and to use and enjoy its properties, all located within the State of Alabama, and to derive a reasonable return therefrom.

*Paragraph XXII*

Action by these defendants in the respects herein set forth, whether in furtherance of the unlawful conspiracy herein alleged or otherwise, will amount in practical substance and effect to actual construction and operation of the projects herein complained of by these defendants without warrant in law and illegally and not by the aforesaid cities.

*Paragraph XXIII*

Plaintiff is informed and believes, and therefore charges, that a part of the plan for the construction of publicly owned electric distributing systems in the Cities of Florence, Sheffield and Tuscumbia, induced by PWA as aforesaid, is that said cities shall when said municipal systems are completed revoke and terminate plaintiff's right to carry on its business in each of such cities and plaintiff will be compelled to abandon entirely its business, properties and systems in such cities. If it were not for such plan and for such inducement of PWA plaintiff would in all reasonable probability continue to enjoy the right to carry on its business in each of said cities for many years.

If the City of Decatur obtains in pursuance of the
382 plan hereinbefore alleged such a Public Works Project it will operate such system in competition with plaintiff, and plaintiff will be compelled either to suffer substantial and continuous losses in its operations in such city or to abandon entirely its property and system therein, as shown by the fact that, in anticipation of receiving such a project, the city authorities, at the instigation and direction of PWA, have made a house-to-house canvass of plaintiff's customers in such city, soliciting their patronage for the proposed municipal electric plant, and have reported to PWA that more than 95% of domestic, 70% of commercial, and 75% of industrial consumers in such city will take power from the municipal plant as soon as service can be begun.

If defendants are permitted to consummate such unlawful plan and make such pretended loans and grants to the Cities of Decatur, Florence, Sheffield and Tuscumbia, plaintiff is informed and believes and therefore states that they will authorize and construct a large number of publicly

owned electric plants in many other cities and towns in the State of Alabama in which plaintiff is engaged in supplying electric public utility service, to be operated in ruinous competition with plaintiff:

As heretofore alleged the business of the plaintiff is made up of a combination of businesses done by it in cities, towns, and rural areas in the State of Alabama as more particularly elsewhere alleged herein, all of which are connected with its system of transmission lines and served by its hydro generating plants. Each local business enables plaintiff better to serve the others and is incapable of withdrawal without substantial impairment of plaintiff's ability to serve the remainder of its customers. The withdrawal of a number of these local businesses would substantially impair plaintiff's ability to continue operation as a going concern in that it would destroy, make useless, and cause to lie idle much of plaintiff's modern, efficient and valuable properties, including dams, steam plant, transmission lines, and distribution systems and thereby would cripple plaintiff in the exercise of its rights, privileges and duties under its aforesaid franchises from the United States.

*Paragraph XXIV*

Plaintiff is informed and believes, and therefore alleges, the said defendants, aided and abetted by the said cities and their respective officials, will, unless restrained by this court, immediately proceed with such projects of con-
383 structing said electric distribution systems in said cities in accordance with said unlawful arrangements and will consummate the execution of said proposed and contemplated arrangements and will perform the acts and do the things therein contemplated. Said cities have presented or are about to present to defendant Ickes or to one or more of the defendants, officers of PWA, or their agents, initial requisitions of money to be furnished pursuant to said contemplated unlawful arrangement, and said PWA defendants or the defendants Morgenthau, Julian and Allen will, unless restrained by this court, pay over to said city all or a large portion of the loan and grant of public funds of the United States as contemplated to be provided in said arrangements, and will immediately take further steps in consummating said projects. Each and all

of the foregoing threatened acts of said defendants will result in immediate and irreparable injury, loss and damage to plaintiff, as herein specifically alleged.

*Paragraph XXV*

If the defendants or any of them are permitted to continue in said unlawful conspiracy or to carry out the provisions of the unlawful contemplated arrangements, or to do any or all of the acts threatened by them as hereinbefore alleged, the property right of plaintiff to operate its property and to enjoy its franchise free from injurious competition brought about by unlawful means and to conduct its intrastate business and charge rates free from unconstitutional interference and domination by an agency or agencies of the federal government, will immediately be invaded and destroyed; the value of the business of plaintiff in said cities and of its tangible and intangible property acquired and used therein, will immediately be greatly damaged and impaired, and finally rendered utterly worthless. It will immediatey be impossible for plaintiff to obtain new customers or to increase the consumption of electricity by its present customers, but on the contrary plaintiff will immediately lose great numbers of its customers and must engage in a destructive rate war with the danger of being forced to retire from business; furthermore, by reason of said unlawful project it will be impossible for plaintiff to sell or otherwise to dispose of its business and property save as junk and waste.

Further, the plaintiff as a taxpayer subjected to special, rather than general tax burdens, will be specially injured as in this paragraph set forth, and will have been and, in the future will be, subjected to a deprivation of its property for a purpose without warrant in law or in the Constitution and in violation thereof.

By reason of all of the foregoing facts, the plain-
384 tiff, through unlawful interference with, injury to, and deprivation of its property and franchises, will suffer loss of its property without compensation and without that due process of law guaranteed it by the Fifth Amendment to the Constitution of the United States, and such injury and deprivation will constitute an immediate and irreparable loss, for which it has and can have no adequate remedy at law.

*Paragraph XXVI*

Plaintiff alleges that it is futile to ask the defendants to rescind their aforesaid unlawful arrangements with the said cities and their officials. The PWA defendants, aided and abetted by the TVA, its directors, officers, agents, employees and representatives, have for nearly two years continued negotiations with such cities to consummate some such arrangements with them and have finally induced the cities and their officials to revise the original arrangements so as to vary substantially therefrom, and, as is herein alleged, said cities and their officials have been continuously advised, urged and incited by the PWA defendants herein and TVA, its directors, officers, agents, employees and representatives, to press said applications and revise the same, from time to time, to conform to the desires and will of said defendants in furtherance of their unlawful conspiracy against the plaintiff herein alleged.

*Paragraph XXVII*

The said Cities of Florence, Sheffield, Tuscumbia and Decatur and the members of their respective governing bodies are not made parties defendant hereto for the reason that they are without the jurisdiction of this court, and service of process cannot be had upon them in the District of Columbia. The said cities have, as hereinbefore alleged, announced their intention to aid and abet the PWA in the immediate consummation of the said project, and plaintiff is informed and believes, and therefore alleges, that unless the defendants are immediately restrained from doing so they will at once perform the acts alleged herein; plaintiff is further informed and believes and therefore alleges, that the giving of notice of application for a restraining order would precipitate said unlawful acts and that said
385 acts would do all the mischief complained of by the plaintiff herein and would result in immediate and irreparable injury, loss and damage to the plaintiff, whereas restraint of the doing thereof until disposition of plaintiff's application for a temporary injunction has been made would result in no detriment or injury to the defendants.

WHEREFORE, the premises considered, the plaintiff prays:

(1) That process issue against the defendants requiring them to answer this bill (but not under oath or affirmation,

the benefit whereof is hereby expressly waived by the plaintiff).

(2) That this court grant plaintiff a temporary restraining order against defendants, and each of them, enjoining each and all of the defendants, their officers, agents and all persons acting in the aid of said defendants and their successors in office (in so far as they are not already restrained by order of this court), from continuing to do any acts or things in any respect in furtherance of the conspiracy herein alleged, from doing any act or thing towards the execution of said alleged unlawful arrangement for a loan and grant to the Cities of Decatur, Sheffield, Tuscumbia and Florence or from performing any act in contemplation thereof or pursuant thereto; and from in any manner aiding in the construction of or from financing the construction of said electric distribution systems in the Cities of Decatur, Sheffield, Tuscumbia and Florence; and from honoring any requisition and from transferring, lending, giving or disbursing to said cities any funds whatsoever for the purpose of constructing or financing the construction of said electric systems.

(3) That after notice and hearing the court enter a preliminary injunction to the same effect.

386 (4) And that upon final hearing this court enter a final order and decree to the same effect.

(5) And for such other and further relief as to the court may seem meet.

ALABAMA POWER COMPANY
By P. W. TURNER
*Its Vice-President*

EDWARD B. BURLING
SPENCER GORDON
DEAN ACHESON
HOWARD C. WESTWOOD
*Solicitors for the Plaintiff,*
Union Trust Building
Washington, D. C.

NEWTON D. BAKER
*Solicitor for Plaintiff*
Cleveland, Ohio

P. W. TURNER
*Solicitor for the Plaintiff*
Birmingham, Alabama

387 DISTRICT OF COLUMBIA, *ss:*

**P. W. Turner,** being duly sworn, deposes and says that he is Vice-President of Alabama Power Company, a corporation organized under the laws of the State of Alabama, the plaintiff named in the above entitled cause, that he has authority to make this affidavit in behalf of said corporation, that he has read the foregoing amended bill of complaint by him subscribed and knows the contents thereof and that the statements therein made are true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he verily believes the statements to be true.

P. W. TURNER

Subscribed and sworn to before me this 29 day of Feb. 1936.

T. C. MEIDINGER
(Seal). *Notary Public.*

388 *Exhibit "A"*

Filed March 2, 1936.
Frank E. Cunningham, Clerk.

PWA Press Section
Immediate Release Release No. 989

Achievement in certain instances of the administration purpose of making electric energy more widely available at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration.

Municipal or local publically owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.

The statement of Administrator Ickes followed action by some privately owned utilities, which, on re-examination of their condition, found it possible to reduce rates to a point below those proposed by municipal project plants.

In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the

fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program.

In the cases affected Public Works Administration policy will be so administered that municipal plant construction will not be deprived of the possibility of public works support until such time as the local Government feels assured the proposed rate reduction by the existing utility will be in effect on a reasonably permanent basis.

Since the Public Works program began financing electric plants, where they are socially desirable and where they will be self-liquidating, there have been reductions of rates by private utilities in different localities. The private utilities are becoming increasingly cognizant of the greater use of power resulting from lower rates.

Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance mu-
389 nicipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

"Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain instances at least, are so high as to be disadvantageous to the company as well as

unjust to the consumers. Experience shows that lower rates may produce larger profits particularly where promotional campaigns are conducted and the cost of electrical appliances is made reasonable.

"PWA will cooperate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect.

"State laws authorize municipal competition, hence it is PWA's position that the State has determined that such competition may be socially desirable. We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project is self-liquidating at rates lower than those which the existing utility is willing to put into effect."

390 *Answer to Third Amended Bill of Complaint*

Filed March 24, 1936

* * * * * * * * * * *

Come now Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; John Herrick, Executive Assistant thereof; J. J. Madigan, Acting Executive Officer thereof; F. E. Schnepfe, Director of Projects Division thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States; and Guy F. Allen, Chief Disbursing Officer, Division of Disbursements, Treasury Department of the United States; defendants in the above-entitled case, and each of them, and for answer to the amended bill of complaint, say:

391 I.

These defendants are informed that plaintiff is a corporation incorporated under the laws of the State of Alabama, but are without knowledge as to any of the other allegations contained in Paragraph I of the bill of complaint.

II.

Defendants Harold L. Ickes, Horatio B. Hackett, J. J. Madigan and F. E. Schnepfe (hereinafter referred to

jointly as "the PWA defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them, except that they deny that they are threatening to perform any acts under pretended authority.

Defendants Henry Morgenthau, Jr., W. A. Julian and Guy F. Allen (hereinafter jointly referred to as "the Treasury defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them, except that they deny that the Treasurer is in control of the disbursement of public funds of the United States, and aver that he is in control only of the payment of checks drawn upon him and that, with certain minor exceptions not applicable to the instant situation, he has no control over the drawing of such checks; and further deny that they are threatening to perform any acts under pretended authority.

III.

These defendants are advised that the allegations contained in Paragraph III are conclusions of law which they are not required to answer, but if construed to be averments of fact, they deny each and every allegation thereof.

IV.

Defendants deny each and every allegation of fact contained in Paragraph IV of the bill of complaint.

392

V.

These defendants are without knowledge as to any of the allegations contained in Paragraph V of the bill of complaint, and demand strict proof thereof.

VI.

The PWA defendants are without knowledge as to the allegations of Paragraph VI of the bill of complaint, and demand strict proof thereof.

The Treasury defendants admit that plaintiff is a taxpayer of the United States, but say that information as to the amount of taxes paid, and the amount of tax liability incurred, is contained in other offices, that the necessary steps to secure said information have been taken, but that, as yet, they are without knowledge as to the accuracy of the amounts averred in Paragraph VI of the bill of complaint.

VII.

These defendants are without knowledge as to any of the allegations contained in Paragraph VII of the bill of complaint, and demand strict proof thereof.

VIII.

These defendants are without knowledge as to the allegations of Paragraph VIII of the bill of complaint, and demand strict proof thereof, except that the PWA defendants deny that by the terms of the Federal Water Power Act, or any license, agreement or understanding pursuant thereto, the plaintiff is entitled to be protected from competition in the sale of electrical energy by municipalities having a lawful right to engage in such business.

393

IX.

These defendants are without knowledge as to any of the allegations contained in Paragraph IX of the bill of complaint, and demand strict proof thereof.

X.

These defendants are without knowledge as to any of the allegations contained in Paragraph X of the bill of complaint, and demand strict proof thereof.

XI.

These defendants are without knowledge as to any of the allegations contained in Paragraph XI of the bill of complaint, and demand strict proof thereof.

XII.

The PWA defendants deny each and every allegation contained in Paragraph XII of the bill of complaint.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XII of the bill of complaint, and demand strict proof thereof.

XIII.

The PWA defendants deny each and every allegation contained in Paragraph XIII of the bill of complaint, except as hereinafter admitted or qualified.

Further answering the allegations of Paragraph XIII of

the bill of complaint, the PWA defendants say that they are engaged in administering the provisions of Title II of the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935; that by the terms of Title II of the National Industrial Recovery Act of
394 1933, the Federal Emergency Administrator of Public Works, under the direction of the President, is directed to prepare a comprehensive program of public works, and with a view to increasing employment quickly, while reasonably securing any loans made by the United States, (1) to construct, finance, or aid in the construction or financing of any public works project included in such program, and (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, provided that no grant shall exceed 30 per centum of the cost of the labor and materials employed upon the project.

That upon the adoption of said Act, applications were received from States, municipalities, and other public bodies throughout the United States for aid in financing the construction of a large variety of useful public projects, including, inter alia, airports, tunnels, bridges, hospitals, jails, swimming pools, streets and highways, waterworks, sewage and drainage systems, and electric generating, transmission and distribution systems; that all such applications have been carefully examined for the purpose of determining whether the application is authorized by law, and whether the project meets the requirements of the Act of Congress above referred to; that after such examination, the Federal Emergency Administrator of Public Works, with the approval of the President, has included in the comprehensive program of public works many thousands of useful public projects, and has approved the making of loans or grants, or both, to aid in financing the construction thereof, having first determined that each such loan or grant meets the requirements of Title II of the National Industrial Recovery Act, and Executive Orders of the President pursuant thereto, and will effectuate the purposes of said Act.

395 Said defendants further say that the projects included in such comprehensive program have not been

limited to a particular section of the country, the comprehensive program being national in scope; that the projects have not been limited to any particular type or class, but have been greatly diversified; that defendants have not solicited, urged, or induced the construction of any particular type of useful public project, but have acted only at the instance and request of the municipality concerned; that where application is made for a loan or grant, or both, to finance or aid in financing the construction of a project which will involve competition between a municipality and a privately owned utility company, the Administrator has taken the position that it was the intention of Congress that the question of whether such competition is desirable should be left entirely to the municipality concerned; that where a grant only is made, the Administrator has not given any consideration to the question of rates to be charged by the municipality; that where, as in these cases, loans are made to be repaid out of the revenues of the project and not out of local taxes, the Administrator, in determining whether the loans are reasonably secured, has considered the prospective earnings of the projects, and solely for that purpose, the rates which the municipalities proposed to charge; that the loans and grants to the cities of Decatur, Florence, Sheffield, and Tuscumbia were made pursuant to the policy outlined herein; that the sole aim and desire of these defendants is to carry out the mandate of Congress as set forth in the Statutes herein referred to.

The PWA defendants further aver that their activities under and pursuant to said statutes and Executive Orders have resulted in a vast increase in employment and
396 an improvement in the national prosperity, including, among other things, a vast improvement in the credit of municipalities, an increase in the value of municipal bonds and a consequent increase in the assets of national banks and other financial institutions throughout the United States.

The PWA defendants admit that press release no. 989, a copy of which is attached to the third amended bill of complaint, was issued by the press section of the Public Works Administration on September 17, 1934, and that on July 11, 1934, the Administrator dispatched a telegram to Hon. Lee Glenn, Mayor of Florence, Alabama, a copy of which is set

forth in the bill of complaint; said defendants say that such press release and telegram were not intended to and do not adequately set forth the policy of PWA with respect to municipal electric projects and at most, set forth an incomplete statement of such policy; that the true and correct policy of PWA with respect to such projects is as set forth herein.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XIII of the Bill of Complaint, and demand strict proof thereof.

XIV.

The PWA defendants admit that applications were filed by the cities of Decatur, Florence, Sheffield and Tuscumbia, in the State of Alabama, for loans and grants to aid such cities in financing the construction of municipal electric distributing systems in each of such cities; that loans and grants for such purpose have been approved by the Administrator and the President in the following amounts:

| | |
|---|---|
| Decatur | $350,000. |
| Florence | 436,000. |
| Sheffield | 230,000. |
| Tuscumbia | 130,000. |

397 Said defendants deny each and every allegation of Paragraph XIV of the bill of complaint, except as herein specifically admitted or qualified, and further say that plaintiff has been afforded an opportunity to present its objections to the proposed projects, and that such objections were given careful consideration.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XIV of the bill of complaint and demand strict proof thereof.

XV.

The PWA defendants admit that during the month of December 1934, they entered into loan and grant agreements with the cities of Decatur, Florence, Sheffield and Tuscumbia whereby the Government agreed to aid the cities in financing the construction of municipal electric distributing systems; said defendants further aver that in August,

1935, the United States Circuit Court of Appeals for the Eighth Circuit held, in the case of *Arkansas-Missouri Power Co.* v. *City of Kennett*, 78 F. (2d) 911, that a contract similar to the agreements with the four cities herein referred to was invalid under Missouri law because certain provisions thereof constituted an improper delegation of legislative power on the part of the municipality. While the correctness of that opinion seemed doubtful, particularly in its application outside the State of Missouri, it was nevertheless deemed advisable to execute new agreements eliminating the objectionable features of the old. During the first part of December, 1935, the original contracts with each of the four cities were terminated by mutual consent, and new agreements, dated December 4, 1935, entered into between each of the cities and these defendants, true and cor-
398 rect copies of which are appended hereto, and marked Exhibits "A", "B", "C", and "D".

Said defendants further say that all of the conditions of the loans and grants are contained in the agreements of December 4, 1935, above referred to, and that there are no conditions, express or implied, except as set forth therein; that all previous contracts and agreements have been terminated, and that there are no contracts or agreements, oral or written, between the parties, except as set forth in Exhibits "A", "B", "C", and "D".

The PWA defendants deny each and every allegation contained in Paragraph XV of the bill of complaint, except as expressly admitted or qualified herein.

The Treasury defendants have no knowledge as to the allegations of Paragraph XV of the bill of complaint, and demand strict proof thereof.

XVI.

These defendants are without knowledge as to any of the allegations of Paragraph XVI of the bill of complaint, and demand strict proof thereof.

XVII.

The PWA defendants deny each and every allegation of fact contained in Paragraph XVII of the bill of complaint.

The Treasury defendants are without knowledge as to any of the allegations of Paragraph XVII of the bill of complaint, and demand strict proof thereof.

XVIII.

These defendants deny each and every allegation of fact contained in Paragraph XVIII of the bill of complaint.

399

XIX.

Defendants deny each and every allegation contained in Paragraph XIX of the bill of complaint, and say that the funds of the United States are not so allocated that borrowed moneys can be distinguished from the other moneys in the Treasury.

XX.

The PWA defendants deny each and every allegation of fact contained in Paragraph XX of the bill of complaint, and further answering, say that the proposed action of the cities in constructing municipal electric distributing systems and issuing obligations of the type described in Exhibits "A", "B", "C" and "D" has been upheld as valid by the Courts of Alabama in similar cases.

The Treasury defendants deny each and every allegation of fact contained in Paragraph XX, in so far as it pertains to them; and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

XXI.

These defendants deny each and every allegation of fact contained in Paragraph XXI of the bill of complaint.

XXII.

These defendants deny each and every allegation of fact contained in Paragraph XXII of the bill of complaint.

XXIII.

These defendants deny each and every allegation of fact contained in Paragraph XXIII of the bill of complaint, except that they say that they are without knowledge as to the allegations contained in the last sub-paragraph thereof.

400

XXIV.

The PWA defendants admit that, unless restrained, they will make loans and grants to the cities of Decatur, Florence, Sheffield and Tuscumbia, in accordance with the terms

of the offers (Exhibits A, B, C, and D), but deny all other allegations of Paragraph XXIV of the bill of complaint.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, on moneys appropriated by Congress, but deny each and every other allegation of fact pertaining to them, contained in Paragraph XXIV of the bill of complaint, and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

XXV.

The PWA defendants deny each and every allegation of fact contained in Paragraph XXV of the bill of complaint; but the Treasury defendants say that they are without knowledge as to any of said allegations and demand strict proof thereof.

XXVI.

The PWA defendants deny each and every allegation of fact contained in Paragraph XXVI of the bill of complaint; but the Treasury defendants say that they are without knowledge as to any of said allegations and demand strict proof thereof.

XXVII.

The PWA defendants admit that the cities of Decatur, Florence, Sheffield and Tuscumbia are without the jurisdiction of this court and that service of process cannot be had upon them in the District of Columbia. They are without knowledge as to whether the members of their gov-
401 erning bodies are without the jurisdiction of this Court and that service of process cannot be had upon them in the District of Columbia.

They further admit that unless restrained they will make loans and grants to such cities in accordance with the terms of the offers (Exhibits A, B, C, and D).

They deny each and every allegation of fact contained in Paragraph XXVII of the bill of complaint except as expressly admitted herein.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, on

moneys appropriated by the Congress, but deny each and every other allegation of fact pertaining to them, contained in Paragraph XXVII of the bill of complaint, and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

WHEREFORE, the premises considered, these defendants jointly and severally pray that the bill of complaint be dismissed, with proper costs and charges.

JAMES W. MORRIS,
*Assistant Attorney General,*
ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General,*
JOHN W. SCOTT,
*Special Assistant to the Attorney General,*
JEROME N. FRANK,
*Counsel for Federal Emergency Administration of Public Works.*
*Attorneys for Defendants.*

Receipt of copy of the foregoing instrument hereby acknowledged on the 24th day of March, 1936.

HOWARD C. WESTWOOD,
24th of March, 936.
*Counsel for Plaintiff.*

*Exhibit A to answer to third amended bill of complaint.*

402 Copy Conformed to
Executed Original
Legal Division, P. W. A. P. W. 46002-12
Checked Rice Date Dec 6 1935.

Federal Emergency Administration
of Public Works

Accepted by applicant
Dec 7 1935
Date
City of Decatur,
Morgan County, Alabama.

Washington, D. C.
December 4, 1935.
PWA Docket No. 6587.
Filed March 24, 1936
Frank E. Cunningham,
Clerk

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the

construction of an electrical distribution system, including the low side of the substation and equipment (herein called the "Project") by making a loan and grant to the City of Decatur, Alabama (herein called the "Applicant") in an amount not exceeding in the aggregate the sum of $350,000.

2. *Method of Making Loan.* The Government will purchase from the Applicant, at the principal amount thereof plus accrued interest, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $268,000, less such amount of such obligations, if any, as the Applicant may sell the purchasers other than the Government:

(a) Obligor: City of Decatur;

(b) Type: Special obligation, serial, coupon bond;

(c) Denomination: $1,000; (d) Date: September 1, 1934;

(e) Interest rate and interest payment dates: Four per cent per annum, payable on March 1, 1935, and semi-annually thereafter on September 1 and March 1 in each year;

(f) Place of Payment: At the office of the City Treasurer, Decatur, Alabama, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York;

(g) Registration privileges: At the option of the holder, as to principal only;

(h) Maturities: On September 1 in years and amounts as follows:

| | |
|---|---|
| 1937-1940, inclusive | $9,000, |
| 1941 and 1942 | 12,000, |
| 1943 and 1944 | 14,000, |
| 1945-1954, inclusive | 18,000; |

403

(i) Security: Payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

3. *Amount of Grant.* The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The Govern-

ment will make the grant either wholly by the payment of money, or partly by the payment of money and partly by the cancellation of obligations purchased pursuant to this offer or interest coupons attached thereto, in aggregate amount equal to the amount of the grant less the amount in money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $100,000.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the Project described in this offer for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the

construction, cost, and progress of the work. Upon
404 request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the prepartion of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 5 percent of the estimated cost of labor and materials to be employed on the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment for Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Gov-

ernment, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 15 percent of said previously estimated cost of labor and materials to be em-
ployed upon the Project. When the Project shall be
405 approximately 70 percent completed the Applicant
may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 30 percent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 30 percent of the actual cost of labor and materials employed upon the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and

any other moneys which shall be required in addition to the foregoing, to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Accounts shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes 406 of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be consrued under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name if followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is

used in lieu of descriptive detail of substance and function, the term "or equal" is to be [illegible]lly construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of such project, except in cases in which it is required by the laws of Alabama that protection for labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly
407 as possible after funds are made available and be

continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desires, be inserted verbatim in such construction contract or contracts).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

UNITED STATES OF AMERICA
*Federal Emergency Administrator of Public Works*

By (Sgd.) Horatio B. Hackett
*Assistant Administrator.*

408 Exhibit "A"

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week;

PROVIDED, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

| Trade Occupation | Hourly Wage Rate |
|---|---|
| ..... | ..... |
| ..... | ..... |

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: PROVIDED, HOWEVER, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of ..... to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, to-

gether with a statement of the deductions therefrom
409 for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of.... ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.'"

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) ..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) ..... ..... PROVIDED, That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor. In case
410 any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide, ..... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operation be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $..... for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less

than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

.....

.....

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such
411 laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufac-

tured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the

412

following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 99 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs*—The contractor shall furnish signs bearing the legend: "FEDERAL PUBLIC WORKS PROJECT NO. ....." as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4 inclusive, 6, 8 to 13 inclusive, 17, the Regulations Issued Pursuant to So-called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

16. *Termination for Breach.*—In the event that any
413 of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P.W.A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1(b):

*And provided further.* It having been determined
414 prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1(b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

*Regulations Issued Pursuant to So-Called "Kick-Back Statute"*

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

Section 2. Each contractor and subcontractor en-
415 gaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ..... (name the party signing affidavit) ..... (Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate re-

port of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of ..... (project), for the weekly pay roll period from the..... day of ....., 193...., to the ..... day of ....., 193...., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of ..... .....193....

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit
416 with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by

Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

---

The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

417 *Penalty*

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

*Exhibit B to answer to third amended bill of complaint.*

418 Copy Conformed to

Executive Original

Legal Division, P. W. A.. P. W. 46002-11
Checked Rice Date Dec 6 1935

Federal Emergency Administration
of Public Works

Washington, D. C.
December 4, 1935.
PWA Docket No. 4259.

City of Florence,
State of Alabama.

Filed March 24, 1936.
Frank E. Cunningham,
Clerk.

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of an electric distribution system, including a sub-station, an office building and a warehouse (herein called the "Project") by making a loan and grant to the City of Florence, Alabama (herein called the "Applicant"), in an amount not exceeding in the aggregate the sum of $436,000.

2. *Method of Making Loan.* The Government will purchase from the Applicant; at the principal amount thereof plus accrued interest, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $336,000, less such amount of such obligations, if any, as the

Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Florence;

(b) Type: Special obligation, serial, coupon bond;

(c) Denomination: $1,000; (d) Date: April 1, 1934;

(e) Interest rate and interest payment dates: Four per cent per annum, payable on October 1, 1934, and semi-annually thereafter on April 1 and October 1 in each year;

(f) Place of payment: At the office of the City Treasurer, Florence, Alabama, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York;

(g) Registration privileges: At the option of the holder, as to principal only;

(h) Maturities: On April 1 in years and amounts as follows:

| | |
|---|---|
| 1938 | $11,000, |
| 1939 | $12,000, |
| 1940 | $13,000, |
| 1941-1945, inclusive | $14,000, |
| 1946-1955, inclusive | $15,000, |
| 1956-1959, inclusive | $20,000; |

(i) Security: Payable solely from and secured
419 only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

3. *Amount of Grant.* The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The Government will make the grant either wholly by the payment of money, or partly by the payment of money and partly by the cancellation of obligations purchased pursuant to this offer or interest coupons attached thereto, in aggregate amount equal to the amount of the grant less the amount in money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $120,000.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as heretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the Project described in this offer for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plan and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to

aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 5 percent of the estimated cost of labor and materials to be employed on the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used;

(b) *Payment for Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete;

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 15 percent of said previously estimated cost of labor and materials to be

421 employed upon the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 30 per cent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 30 percent of the actual cost of labor and materials employed upon the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto;

(e) *Construction Account.* A Separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing, to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account;

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified

in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund;

(g) *Use of Moneys in Bond Fund.* Moneys in the
422 Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment;

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory;

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder;

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount

equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of such project, except in cases in which if is required by the laws of Alabama that protection for labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate;

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor;

(f) That minimum or other wage rates required to
423 be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents;

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner;

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desires, be inserted verbatim in such construction contract or contracts).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such

rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

UNITED STATES OF AMERICA
*Federal Emergency Administrator*
*of Public Works*

By (Sgd.) HORATIO B. HACKETT
*Assistant Administrator.*

424

Exhibit "A"

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week; PROVIDED, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

| Trade Occupation | Hourly Wage Rate |
|---|---|
| ..... | ..... |
| ..... | ..... |

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: PROVIDED, HOWEVER, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of ..... to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.'"

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United

States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) .....
and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) .....
PROVIDED, That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered

by the protection accorded by the contractor. In case
426 any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide, ..... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $..... for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

.....

.....

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part

thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such
427 laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the proj-
428 ect, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P.W.A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof,

on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs*—The contractor shall furnish signs bearing the legend: "FEDERAL PUBLIC WORKS PROJECT NO. ....." as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4 inclusive, 6, 8 to 13 inclusive, 17, the Regulations Issued Pursuant to So-called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

16. *Termination for Breach.*—In the event that any
429 of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and

perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P.W.A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1(b):

*And provided further.* It having been determined prior to advertisement that a sufficient amount of
430 labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1(b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

## Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employ-

ment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

Section 2. Each contractor and subcontractor en-
431 gaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ..... (name the party signing affidavit) ..... (Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of ..... (project), for the weekly pay roll period from the ..... day of ....., 193...., to the ..... day of ....., 193...., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force,

intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of .....193..

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affi-
432 davit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

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The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' *Statute*" *shall not be construed to prohibit deductions* required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

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433 *Penalty*

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

*Exhibit C to answer to third amended bill of complaint.*

434 Copy Conformed to
Executed Original
Legal Division, P. W. A.
Checked Rice Date Dec 6 1935

P. W. 46002-15

Federal Emergency Administration
of Public Works

Accepted by applicant
Dec 7 1935

Washington, D. C.,
December 4, 1935.

Date

PWA Docket No. 3124.

City of Sheffield,
Colbert County, Alabama.

Filed March 24, 1936
Frank E. Cunningham,
Clerk

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of an electric transmission line and distribution system, and other necessary appurtenances thereto (herein called the "Project") by making a loan and grant to the City of Sheffield herein called the "Applicant") not exceeding in the aggregate the sum of $230,000.

2. *Method of Making Loan.* The Government will purchase, at the principal amount thereof, plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $187,000, less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Sheffield;

(b) Type: Special obligation, revenue serial coupon bond;

(c) Denomination: $1,000; (d) Date: April 1, 1935;

(e) Interest Rate and Interest Payment Dates: 4 percent per annum, payable semi-annually on April 1 and October 1;

(f) Place of Payment: At the office of the City Treasurer, Sheffield, Alabama, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York;

(g) Registration Privileges: Registerable at the option of the holder as to principal only;

(h) Maturities: Payable on April 1 in years and amounts as follows:

| Year | Amount |
|---|---|
| 1938-1945 (both inclusive) | $10,000, |
| 1946 | 11,000, |
| 1947-1954 (both inclusive) | 12,000; |

(i) Security: Payable as to both principal and in-
435 terest solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

3. *Amount of Grant.* The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The Government will make the grant either wholly by the payment of money, or partly by the payment of money and partly by the cancellation of obligations purchased pursuant to this offer or interest coupons attached thereto, in aggregate amount equal to the amount of the grant less the amount in money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $52,000.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition:* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project:* If it appears that the Applicant will not be able to complete the Project described in this offer for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes:* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes

to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the
436 Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 5 percent of the estimated cost of labor and materials to be employed on the Project. This advance grant may be used for paying architectural, engi-

neering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment of Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a
437 grant of an amount representing the difference between the advance grant and an amount equal to 15 percent of said previously estimated cost of labor and materials to be employed upon the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 30 percent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting

the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 30 percent of the actual cost of labor and materials employed on the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing, to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to purchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the
438 Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth shall be subject to the

condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of such project, except in cases in which it is required by the laws of Alabama that protection for labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage

439 insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desires, be inserted verbatim in such construction contract or contracts).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

UNITED STATES OF AMERICA
*Federal Emergency Administrator*
*of Public Works*
By (Sgd.) HORATIO B. HACKETT
*Assistant Administrator.*

440 Exhibit "A"

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week; PROVIDED, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

| Trade Occupation | Hourly Wage Rate |
|---|---|
| ..... | ..... |
| ..... | ..... |

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: PROVIDED, HOWEVER, That this clause shall not be construed to prohibit

the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of ..... to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom
441 for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations issued Pursuant to So-called 'Kick-Back Statute.'"

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) ..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) ..... PROVIDED, That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor.

442 In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide, ..... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $..... for injuries, including wrongful death, to any

one person, and, subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

.....

.....

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on
443 the work and the rate of wages actually paid to such laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project,
444 the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the cur-

rent month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs*—The contractor shall furnish signs bearing the legend:

"Federal Public Works Project No. ....."

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4 inclusive, 6, 8 to 13 inclusive, 17, the Regulations Issued Pursuant to So-Called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval

of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

445 16. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1(b):

446 *And provided further.* It having been determined prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1(b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

## Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 3, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

447 Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ..... (name the party signing affidavit) .....(Title), do hereby certify that I am (the employee of)..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of .....(project), for the weekly pay

roll period from the.....day of....., 193..., to the.....day of....., 193..., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this.....day of.....193...

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

448 Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

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The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

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449 Penalty

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious

statement * * *'' relating to any matter within the jurisdiction of any governmental department or agency.

450 *Exhibit D to Answer to Third Amended Bill of Complaint*

Copy Conformed to
Executed Original
Legal Division, P. W. A:
Checked Rice Date Dec 6 1935

P. W. 46002-16

Federal Emergency Administration
of Public Works

Washington, D. C.,
December 4, 1935.
PWA Docket No. 3125.
Filed March 24, 1936
Frank E. Cunningham
*Clerk*

City of Tuscumbia,
Colbert County, Alabama.

1. *Offer.* The United States of America (herein called the ''Government'') hereby offers to aid in financing the construction of an electric transmission line and distribution system, and other necessary appurtenances thereto (herein called the ''Project'') by making a loan and grant to the City of Tuscumbia (herein called the ''Applicant'') not exceeding in the aggregate the sum of $130,000.

2. *Method of Making Loan.* The Government will purchase, at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $105,000, less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Tuscumbia;

(b) Type: Special obligation, serial, coupon bond;

(c) Denomination: $1,000; (d) Date: June 1, 1934;

(e) Interest rate and interest payment dates: 4 per cent per annum, payable semi-a[illegible]on June 1 and December 1;

(f) Place of payment: Payable at the office of the City Treasurer, Tuscumbia, Alabama, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York;

(g) Registration privileges: Registerable at the option of the holder as to principal only;

451 (h) Maturities: Payable on June 1 in years and amounts as follows:

| Year | Amount |
|---|---|
| 1937 and 1938 | $4,000 |
| 1939 — 1945 (both inclusive) | 5,000 |
| 1946 — 1948 (both inclusive) | 6,000 |
| 1949 — 1952 (both inclusive) | 7,000 |
| 1953 and 1954 | 8,000; |

(i) Security: Payable as to both principal and interest solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for reasonable cost of operation and maintenance thereof.

3. *Amount of Grant.* The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the project. The Government will make the grant either wholly by the payment of money, or partly by the payment of money and partly by the cancellation of obligations purchased pursuant to this offer or interest coupons attached thereto, in aggregate amount equal to the amount of the grant less the amount in money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $30,000.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the Project described in this offer for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a

certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

452 5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 per cent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers for any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 5 per cent of the estimated cost of labor and materials to be employed on the Project. This

advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and cost of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment of Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

453 (c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 15 per cent of said previously estimated cost of labor and materials to be employed upon the Project. When the Project shall be approximately 70 per cent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 30 per cent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 30 per cent of the actual cost of labor and materials employed upon the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing, to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

454 (f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to purchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have

been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contract will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of such project, except in cases in which it is required by the laws of Alabama that protection for
455 labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and material-

men's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desires, be inserted verbatim in such construction contract or contracts).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating

to said Project or to the financing or the construction thereof.

UNITED STATES OF AMERICA
Federal Emergency Administrator
of Public Works

By (Sgd.) Horatio B. Hackett
*Assistant Administrator.*

456 Exhibit "A"

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any week; Provided, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

| Trade Occupation | Hourly Wage Rate |
|---|---|
| ..... | ..... |
| ..... | ..... |

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States,

in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, However, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of.....to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the
457 work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.'"

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county)..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District)..... Provided, That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or

their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor. In
458 case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide,.....for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as

well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $..... for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

.....

.....

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on
459 the work and the rate of wages actually paid to such laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The

safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their re-

460 spective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs*—The contractor shall furnish signs bearing the legend:

"Federal Public Works Project No. ....."

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4 inclusive, 6, 8 to 13 inclusive, 17, the Regulations Issued Pursuant to So-called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

461 16. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by

the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1(b):

462 *And provided further.* It having been determined prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1(b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

## Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

463 Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ..... (name the party signing affidavit) .....(Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of..... .....(project), for the weekly pay roll period from the.....day of....., 193.., to the .....day of....., 193.., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this.....day of.....193..

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

464 Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a

statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

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The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause " * * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily author-

ized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

465 *Penalty*

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

466 In the Supreme Court of the District of Columbia

Holding an Equity Court

No. 59671 in Equity

ALABAMA POWER COMPANY, a corporation,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; JOHN HERRICK, Executive Assistant thereof; JOHN J. MADIGAN, Acting Executive Officer thereof; F. E. SCHNEPPE, Director of Projects Division thereof; HENRY MORGENTHAU, JR., Secretary of the Treasury of the United States; W. A. JULIAN, Treasurer of the United States, and GUY AILEN, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States, *Defendants.*

*Memoranda.*

OCTOBER 4, 1935.

Bill of Complaint for an injunction and other relief, filed.

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DECEMBER 30, 1935.

Order of Court of Appeals remanding cause, filed.

467 *Decree Setting Aside Decree Dismissing the Bill and Granting Leave to Parties to File Further Pleadings.*

Filed Dec 30 1935

* * * * * * * *

Upon consideration of the order of the United States Court of Appeals for the District of Columbia entered December 19, 1935, and this day filed in the above entitled cause, remanding said cause to this Court with directions to set aside the final decree entered by this Court dismissing the bill, with leave to the defendants to file any further pleadings or to supplement and amend their present pleadings within ten days, and with leave to the plaintiff to amend or supplement its bill of complaint within ten days thereafter; it is by the Court this 30th day of December, 1935,

ADJUDGED, ORDERED and DECREED, That the decree of this Court entered on October 14, 1935, dismissing the bill of complaint as amended, be, and the same is hereby, set aside and vacated; and it is further

ADJUDGED, ORDERED and DECREED, That the defendants be, and they are hereby, granted leave to file any further pleadings or to supplement and amend their present pleadings within ten days from this date; and that the plaintiff be, and it is hereby, granted leave to amend or supplement its bill of complaint within ten days thereafter.

F. DICKINSON LETTS,
*Justice.*

No objection as to the form of the above decree.

DEAN G. ACHESON,
*Attorney for Plaintiff.*

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

468 *Second Amended Bill of Compliant for an Injunction and Other Relief*

Filed March 2, 1936

* * * * * * * *

Now comes the plaintiff, and by leave of Court files this its amended bill of complaint, and for its causes of action against the defendants alleges:

*Paragraph I*

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, is a resident and citizen of the State of Alabama, and has its principal office and corporate dom. ile in the City of Attalla, Alabama, and sues in its own right.

*Paragraph II*

The following defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found within the District of Columbia, and are more particularly identified as herein specifically set f rth:

Harold L. Ickes is the duly appointed, qualified, and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United
469 States of America dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act".

Horatio B. Hackett is the duly appointed, qualified, and acting Assistant Administrator of PWA.

John Herrick is the duly appointed, qualified, and acting Executive Assistant of PWA.

John J. Madigan is the duly appointed and qualified Acting Executive Officer of PWA.

F. E. Schnepfe is the duly appointed, qualified, and acting Director of Projects Division of PWA.

Henry Morgenthau, Jr. is the duly appointed, qualified, and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. Julian is the duly appointed, qualified, and acting Treasurer of the United States and, as such, is under the supervision of the Secretary of the Treasury, in control of the disbursement of the public funds of the United States.

Guy Allen is the duly appointed, qualified, and acting Chief Disbursing Officer of the Treasury Department and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual

drawing and issuing of checks on behalf of the United States, and the actual disbursements of the public funds of the United States.

Each of the foregoing officers or employees is sued on account of acts which he threatens to perform under the pretended authority of Title II of the National Industrial Recovery Act as extended by section 12 of the Emergency Relief Appropriation Act of 1935 and paragraph (a) of the President's Executive Order of June 7, 1935.

*Paragraph III*

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

*Paragraph IV*

Plaintiff institutes and brings this suit in its several capacities as a citizen and property owner lawfully
470 engaged in business, as the owner of real and personal property and franchises and as a federal, state, county and municipal tax payer sustaining special damages and special tax burdens peculiar to it and not sustained by taxpayers generally. Plaintiff's said business, property and franchises will be irreparably injured, damages or destroyed unless the relief herein prayed for is granted with the result that plaintiff will suffer direct pecuniary loss amounting to many thousands of dollars, all as hereinafter more particularly set forth.

*Paragraph V*

Plaintiff is a taxpayer of each of the Towns of Guntersville, Hartselle and Russellville, in the State of Alabama, and of the Counties in which such Towns are located, and with respect to its hereinafter mentioned electrical properties and operations in each of said Towns has paid to said Towns and said Counties many thousands of dollars in taxes in the past, and for the twelve months ended December 31, 1934, has paid or incurred the liability to pay such taxes as indicated in the following table:

| *Town* | *Tax Paid* | *County* | *Tax Paid* |
|---|---|---|---|
| Guntersville .... | $ 1,468.22 | Marshall ..... | $ 6,720.68 |
| Hartselle ..... | 579.49 | Morgan ..... | 10,070.71 |
| Russellville ..... | 1,350.24 | Franklin ..... | 4,110.17 |

Plaintiff is likewise a taxpayer of the State of Alabama, and with respect to its electrical properties and operations in said State has paid to said State many thousands of dollars in taxes in the past, large portions of which sums are paid back by the State to the various communities, including the Towns aforesaid, to be expended by such communities for their municipal purposes; and for the twelve months ended December 31, 1934, plaintiff has paid, or incurred the liability to pay, such taxes to the State in excess of the sum of Nine Hundred Thousand Dollars ($900,000.00). Plaintiff has incurred the liability to pay taxes to the Towns, the counties, the State, and other political subdivisions, for the current tax year 1935, in approximately the same amounts as paid and incurred for the year 1934, as aforesaid.

*Paragraph VI*

Plaintiff is a taxpayer of the United States, and with respect to its electrical properties and operations in the State of Alabama, including the properties and operations in each of the aforesaid Towns, has paid to the
471 United States many thousands of dollars in taxes in the past; and under the provisions of an Act of Congress, approved June 16, 1933 (48 Stat. 254, 256), for the period ended January 1, 1936, has paid, or incurred the liability to pay to the United States excise taxes in the sum of Two Hundred Seventy Thousand Dollars ($270,000.00) and has incurred the liability to pay to the United States similar taxes for the current year of 1935.

*Paragraph VII*

Plaintiff alleges that by its charter it has the right to manufacture, supply and sell to the public electric energy produced either by steam or by water as a motive force, or by both, for lighting, heating, power and other purposes. Plaintiff now owns and operates electric public utility properties, serving the public in sixty-five of the sixty-seven counties of the State of Alabama. These properties consist of hydro-electric and of steam generating plants, of high tension transmission lines, of distribution lines, and all equipment and facilities necessary for use in generating, transmitting, distributing, metering and delivering electric

energy to meet the demands of electricity consumers in the State of Alabama.

Plaintiff is now serving, directly and indirectly, approximately two hundred thousand (200,000) customers within said State, and its gross electrical revenue received therefrom in 1934 was approximately Fifteen Million Dollars ($15,000,000). Plaintiff's system is an integrated whole, coordinated so as to anticipate future needs and growth of the communities in the State of Alabama, and represents intensive application of the economies of large-scale, integrated power development. The loss of substantial numbers of its customers in any particular locality would materially impair the benefits to it and its customers derived from such integration.

Plaintiff's system is modern and efficient and in all respects equipped to furnish the public in Alabama with electricity service according to the most advanced standards of electrical engineering. The capacity of its electric plants is adequate to furnish more than the present demand upon it for electricity within said State, a capacity ample to supply all additional uses and users which may reasonably be foreseen in the future.

Among other communities served by said system are the Town of Guntersville, County of Marshall, the Town of Hartselle, County of Morgan, and the Town of Russellville, County of Franklin. These Towns are located in close proximity to each other in the northern portion of
472 the State of Alabama, and together form a vital link in the plaintiff's system in that region. The following table indicates the approximate population of each of said Towns, the approximate number of customers served by plaintiff therein, and the gross revenues of plaintiff from its electrical operations therein for the twelve months ended December 31, 1934:

| *Town* | *Approximate Population* | *Approximate No. of Customers* | *Gross Revenues of Plaintiff from such electric operations for year ending December 31, 1934* |
|---|---|---|---|
| Guntersville | 2826 | 546 | $51,546.07 |
| Hartselle | 2204 | 560 | 24,507.11 |
| Russellville | 3146 | 564 | 71,186.07 |

*Paragraph VIII*

The plaintiff's system, including that portion represented by the aforesaid Towns and the customers therein, is served almost entirely by plaintiff's hydro-electric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, which was constructed by authority of an Act of Congress (34 Stat. 1288), whereby plaintiff was granted a license to build a dam across said river, a navigable water of the United States, at the location named, for the improvement of navigation on such river and the development of the water power inherent therein; and Mitchell Dam and Jordan Dam, likewise on the Coosa River in Alabama; and Martin Dam on the Tallapoosa River in Alabama, which latter three dams were constructed under licenses from the Federal Power Commission, authorized by the Federal Water Power Act (41 Stat. 1063). In granting such licenses the Federal Power Commission found:

1. That each of such dams on the Coosa River were necessary and convenient for the development and improvement of navigation and utilization of power therein;

2. That such dams were best adapted to a comprehensive scheme of development and utilization of such waterways for such purposes;

3. That said Tallapoosa River was a non-navigable stream and that the impounding and the release of the waters of such river would benefit navigation on the Alabama River, a navigable stream, formed by the junction of the Tallapoosa and Coosa rivers;

4. That there was a market in Alabama for the power output of such plants;

5. That such dams were justified in the public interest.

Under and by such Act of Congress and such licenses, plaintiff was required to expend large sums in preparing certain portions of the Coosa River bed for future
473 navigation to and through such dams and in the building of piers in the streams to form ultimate navigation guides to such locks; and, in addition, so to construct such dams that locks could be erected therein as and when the United States determined to complete the navigation from one pool level to the next; by the terms of the Coosa River licenses, the licensee was required to permit of

discharge through its dams, free of cost to the United States, of such part of the flow of the river necessary for the purpose of such lockage and to install such lights, signals, and power for the operation of such navigation structures as might be installed in the future by the United States; and with respect to Lay Dam, the plaintiff is required to convey to the United States a right of way around the end of such dam, and by the subsequent licenses issued to the plaintiff under which Mitchell Dam was erected, the plaintiff was required to make such excavations and perform such other channel work to complete a passage way from the lock around Lay Dam to the pool level created by Mitchell Dam as might be necessary; and in connection with all such work plaintiff spent a large amount of money and has obligations in connection with the future use of such facilities and locks for navigation purposes in a sum that is not capable of present ascertainment. Under and by virtue of such licenses, plaintiff was required also to make such installations in the Coosa and Tallapoosa river projects as the Federal Power Commission should deem necessary from time to time to supply adequately the reasonable market demands of the public. Such hydro-electric projects on the Coosa and Tallapoosa were built at a cost to the plaintiff of an amount in excess of $60,000,000. The completion of such projects on the Coosa River created contiguous slack water pools of 57 miles in length, and when such pools are connected by locks placed in the aforementioned dams such pools will afford a nine-foot depth navigation on such river for a distance of 49 miles.

Plaintiff in good faith accepted the licenses from the Federal Power Commission and built Mitchell and Jordan Dams, resulting in the creation of navigable features of the Coosa River as set out above, and in the improvement of the navigable features of the Alabama River, all with the agreement and understanding under the Federal Water Power Act and the licenses issued to plaintiff thereunder that the plaintiff would secure, as the consideration moving to it for the investment in excess of $60,000,000 made under the licenses so issued, the right and privilege freely to serve the market in Alabama with electric energy.

474 *Paragraph IX*

Plaintiff is authorized by the laws of the State of Alabama to construct, own, operate, and maintain its plant facilities and system in each of the municipalities in which it renders electric service, including Guntersville, Hartselle and Russellville.

On August 10, 1915, the Town of Hartselle, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

On July 5, 1915, the Town of Guntersville, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

On June 28, 1923, the Town of Russellville, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

None of the above mentioned grants of franchises and rights to plaintiff contains any limitation as to the duration of such franchise and right, nor does the general law of the State of Alabama or the corporate powers of plaintiff impose any limit on the duration of such franchise and right, but all of the above mentioned franchises are in perpetuity, and are now in full force and effect.

Plaintiff has continuously and without interruption exercised and performed said franchises from the date of their original grant to the date of the filing of this bill of complaint.

Plaintiff is the only person, firm or corporation engaged in supplying electric light and power to the three towns named herein and their inhabitants and is the only person, firm or corporation now able to supply electric light and power to such towns and their inhabitants.

*Paragraph X*

The plaintiff's properties, plants, lines, and other facilities are modern and efficient and the plaintiff is equipped to and does render efficient and adequate electric utility ser-

vice in all the municipalities and rural districts in
475 which it operates, including the aforesaid Towns, and possesses facilities of adequate capacity to continue the rendition of such type of service for a considerable time in the future without substantial additions thereto.

The rates for sale of electric power and energy of the plaintiff and the character of its service in the State of Alabama are subject to regulation of and are regulated by the State of Alabama through its Public Service Commission; and the rates now in effect in the territory served by the plaintiff in the State of Alabama and in the Towns aforesaid are rates approved as reasonable by, and placed in effect pursuant to order of, the Alabama Public Service Commission.

*Paragraph XI*

Plaintiff alleges that its electricty business in the aforesaid Towns is conducted pursuant to valid and subsisting franchise privileges granted to it by the Government of the United States through the Act of Congress and the licenses of the Federal Power Commission referred to in Paragraph V, and by the aforesaid Towns, as alleged in Paragraph VI.

In reliance upon their franchise rights plaintiff and its predecessors have over a long period of years established and operated, and plaintiff now owns and operates the aforesaid services as a going business in such Towns, with many customers and business contacts, financial credit and reputation acquired, established, developed and expanded at great expense and at the risk of the private investment of funds by the holders of its various securities.

The plaintiff is enjoying, and for many years has enjoyed, the goodwill of its customers in the State of Alabama, including the aforesaid Towns. The plaintiff has, and at all times prior hereto has had, ample facilities and is and has been ready and willing to serve any and all customers within the entire territory served by plaintiff's utility systems. The inhabitants of Alabama, and particularly of the Towns of Guntersville, Hartselle and Russellville, are, and for many years prior hereto, have been ready, willing and desirous of using the service of plaintiff. The good relations between the plaintiff and its customers rep-

resents one of its most valuable assets. The plaintiff is rendering, and for many years prior hereto has been rendering, high class, efficient, dependable service at reasonable rates, and, except for the acts of the defendants
476 hereinafter specified, there is every reasonable probability that the friendly business relationships existing between it and its customers in Alabama, and particularly in the Towns of Guntersville, Hartselle and Russellville, will continue indefinitely on the same satisfactory basis which now exists and which has existed for many years past with mutual satisfaction and profit to the plaintiff and its customers.

*Paragraph XII*

As hereinafter more fully appears, plaintiff is informed and believes and therefore avers that said defendants Ickes, Hackett, Madigan and Schnepfe (hereinafter together referred to as the PWA defendants) acting in concert with anothey agency of the Federal Government, to-wit Tennessee Valley Authority (hereinafter sometimes called TVA) and/or its directors, officers, agents and representatives sometime in the year 1933 formed a plan unlawfully to disrupt the good relations existing between plaintiff and its customers and to invade and destroy the property, business and business relationships of plaintiff in the preceding paragraph described, and conspired and unlawfully agreed together and have ever since so conspired and agreed, by and through unlawful means, including unlawful use of public funds of the United States by PWA to take unlawfully from plaintiff its business, rights and property by destroying the same so far as possible or rendering them useless wholly or to a great but unascertainable degree and greatly impairing, if not wholly destroying the value thereof. Said defendants are now and for some time have been proceeding unlawfully to induce, finance and cause the construction of an electric distribution system in said Towns, and the operation thereof in competition with plaintiff in the sale of electricity in said Towns and elsewhere, where the plaintiff is now lawfully engaged in its business.

*Paragraph XIII*

Commencing in 1933, the President announced and undertook the execution of a permanent "national power policy" to make electricity "more broadly available at cheaper rates to industry, to domestic and to agricultural consumers", to effectuate Federal regulation of rates for the intrastate generation, distribution and sale of electricity, to establish Federal regulation and control over matters of policy and service in connection with intrastate electric utilities and to promote and bring about public ownership or cooperative ownership of facilities for the generation, transmission and distribution of electricity in intrastate commerce.

477

In furtherance of said "national power policy", the Federal Government has established great Federally owned power projects as "yardsticks" by which to measure cost of electricity and to regulate intrastate rates and charges for electricity and has established or utilized various additional agencies such as PWA, TVA and the Rural Electrification Administration. Such agencies have been and are actually engaged in carrying out various phases of said "national power policy".

In particular, sometime in 1933, after the passage of the National Industrial Recovery Act, the PWA defendants and particularly the defendant Ickes, acting pursuant to and in furtherance of this "national power policy", conceived and have since been executing throughout the United States a plan, scheme or policy to promote public ownership and operation of local intrastate electric utilities regardless of local state policy and to regulate and fix the rates at which privately-owned intrastate electric utilities should serve the public in the various states and thereby to extend Federal control over matters of intrastate commerce and local police power. The plan is not intended to have and in fact does not have any relation to interstate commerce. Its intended and actual effect is control and regulation of entirely local and intrastate commerce and matters of state police power.

It has been carried out through the promulgation by PWA defendants of a policy of constructing with federal funds local intrastate electric utilities under the claim of

authority so to do in the National Industrial Recovery Act or in the Emergency Relief Appropriation Act of 1935 and to the end of regulation of intrastate electric rates through direct federal competition and federally-subsidized competition regardless of whether existing rates were and are established by state authority and were and are reasonable or unreasonable.

In the United States generally, the plan and purpose of the PWA defendants is effected by inducing and persuading the municipalities and other political subdivisions in the various states to conspire and act in concert with the PWA defendants in the accomplishment of their illegal purposes and in the unconstitutional and illegal disbursement of public monies of the United States by joint action in carrying out as Federal Public Works Projects the construction of electric generating and distributing plants and systems within such subdivisions planned, built and financed
478 under the control and direction of the PWA defendants and to be operated in such manner as from time to time directed by the PWA defendants. Such projects wher undertaken, are carried out in such manner that the political subdivisions which are nominally to construct and operate the projects are mere dummies in such construction and operation under the control, direction and domination of the PWA defendants.

In applying this plan in the states generally, the PWA defendants usually threaten private electric utilities in particular locations with the construction of such project with federal monies unless such private utilities agree to establish rates satisfactory to the PWA defendants. The rates so to be established usually demanded by the PWA defendants are arbitrary, unreasonable and non-compensatory. If the private utility threatened with direct federal competition or federally-subsidized competition through the establishment of such project accedes to the demands of the PWA defendants, the project is usually abandoned. If the threat is disregarded, the PWA defendants go forward with the project without regard to the extent of unemployment in the particular location or elsewhere, the relation between employment given by such project and the character of the workers unemployed, the dependability and economic soundness of the existing private utility, the

capacity of the location to absorb the increased electricity produced or other considerations relating to the need for such project, all of which are excluded entirely or given no substantial consideration by PWA defendants in reaching a decision to construct and operate the project.

To induce the necessary concert of action by the political subdivisions in the various states and to procure their consent to such Federal Works Projects, PWA defendants by advertising and other newspaper publicity and by circulars and by direct statements which have been and are being made to the political subdivisions of the several states by the PWA defendants offer to meet the entire cost of such projects by outright gifts of thirty per cent. and more recently, of forty-five per cent. of the cost of the project and by pretended loan of the balance of the cost repayable by its terms only out of the net revenues from the operation of the project so that no financial risk whatever will be incurred by the political subdivision. In the construction and operation of the proposed project either by express contract or by requirements of compliance with general rules, regulations and conditions imposed by the PWA defendants, little, if any, discretion is vested in the particular subdivision with respect to the details of the
479 construction thereof or of the subsequent operation.

Arrangements made by the PWA defendants for the construction and operation of such a project constitute a pretense and sham in that they do not in fact provide for a real loan of monies but merely for the possible recapture of part of the cost of the project out of the net revenues, if any, from its operation, and impose no obligation upon the particular political subdivision and confer no authority upon it in the construction of the project. By express or implied threats of competition with such federally-subsidized projects, the PWA defendants have sought and continue to seek a regulation by them of intrastate electric utility rates and a general and purely arbitrary lowering of intrastate electric utility rates.

This plan is frankly acknowledged by PWA defendants in public press releases and public statements of the defendant Ickes, public offers made generally throughout the several states to their political subdivisions, in instructions given to the agents of PWA charged with the administra-

tion of their affairs, in negotiations with existing private utilities and otherwise. Among other instances, said plan was publicly set forth in Press Release No. 989 under date of September 17, 1934, a copy of which is attached hereto and marked Exhibit "A".

In the Tennessee Valley states, and particularly in the State of Alabama, the general plan of the PWA defendants above set forth has been varied by concert of action with TVA, its directors, agents and representatives in such a fashion as to provide, secure and exercise Federal control over intrastate local distribution rates for electric light, heat, and power through TVA rather than directly by PWA. Specifically PWA has induced and coerced the aforesaid Towns of Guntersville, Hartselle and Russellville to enter into agrements with TVA whereby TVA fixes and determines the rates and charges which said Towns will make for the electricity produced at the contemplated projects. Said agreements are a part of the "national power policy" hereinabove referred to and are intended and designed to further the establishment of federaly controlled "yardsticks" to measure the cost of electricity and to regulate intrastate rates and charges for electricity. This design and purpose is illustrated by the telegram dispatched by defendant Ickes from Washington, D. C., under date of July 11, 1934 to Hon. Lee Glenn, Mayor of Florence, Alabama. Said telegram read as follows:

480 "Washington D C
1934 July 11

Hon. Lee Glenn
Mayor, Florence, Ala.

Lilienthal TVA has explained proposal to communities North Alabama whereby Authority will purchase distribution facilities Florence and other communities from Alabama Company, rehabilitate them and turn them back to communities. Also your proposal amend your application such manner Florence purchases existing facilities and uses PWA funds for rehabilitation and extensions. Lilienthal informs me that all other communities in area affected have approved TVA plan, that Florence alone is holding out. Policy Public Works is to support TVA. Its proposal furthers regional operation rural electrification pursuant to

President's desire, whereas your proposal impedes that policy. This Administration will advance no funds to Florence for expenditures inconsistent TVA plan. It will aid entire region and in our judgment is highly advantageous to you. However allotment and grant will be maintained and pending completion transaction between TVA and Alabama Company. Suggest you promptly take appropriate action accept TVA proposal so that it may exercise option within effective period.

ICKES, *Administrator.*"

In this area PWA defendants have likewise, and in concert with TVA, its directors, officers, agents and representatives, pursued the unlawful purpose and design of regulation by federally-subsidized competition of intrastate electric utility rates and of fostering a policy of public ownership of intrastate electric utilities.

*Paragraph XIV*

The aforesaid Towns, moved by the actions and inducement alleged in Paragraph XIII, through their respective mayors, filed with PWA applications for Federal Public Works Projects consisting of electric distributing systems to be owned by said Towns, respectively.

While the procedure pursued by PWA, defendant Ickes and his agents in passing upon such applications does not provide for a hearing from those whose property and rights will be injured or destroyed through the authorization and construction of such municipal systems, plaintiff requested and sought a hearing before PWA relative to said applications of the aforesaid Towns. Plaintiff has, however, constantly been denied the privilege of such hearing. Nevertheless, plaintiff filed with PWA a written protest against the approval of the applications of said Towns. Such protest set out in substance the facts heretofore and hereafter alleged in this bill. There is no further board, agency or official of the United States to whom plaintiff may apply to prevent the consummation of the projects in said Towns. Consequently, plaintiff has exhausted all administrative remedies which it could possibly have to prevent
481 such action.

Notwithstanding plaintiff's protests of the appli-

cations aforesaid, plaintiff is informed, believes and avers that such protests were given no consideration whatsoever by PWA, but that, for no purpose other than that of driving down plaintiff's rates and destroying plaintiff's business in accordance with the plan of PWA aforesaid, *and upon findings* that the action of PWA would in fact destroy and drive out plaintiff's business in said Towns, PWA approved such Public Works Projects for said Towns, to be carried out under pretended loan and grant agreements with the Towns at the times and in the amounts set out hereafter, the funds to be used in the erection and construction, as Federal Public Works Projects under the direction and control of PWA, of complete electric distribution systems in the Towns to serve the same parties and purposes as are now served by plaintiff therein. The amounts proposed to be granted to the Towns are equal to forty-five per cent. of the cost of labor and materials to be employed in the construction of such electric distribution systems. The pretended loans and grants plaintiff alleges, upon information and belief, to be of the approximate amounts set out as follows:

| *Town* | *Loan* | *Grant* |
|---|---|---|
| Guntersville ..... | $48,000.00 | $39,272.00 |
| Hartselle ..... | 33,000.00 | 27,000.00 |
| Russellville ..... | 69,000.00 | 56,454.00 |

*Paragraph XV*

Plaintiff is informed and believes and so alleges that the aforesaid plan to construct the said electric systems as Federal Public Works Projects in said Towns for the purposes and objects hereinbefore alleged will immediately be carried out by PWA and the defendants herein, unless restrained, under the following arrangement:

The defendant Ickes and the said Towns have entered into pretended "loan and grant agreements", which, in effect, provide that the defendant Ickes and his agents shall construct said electricity distribution systems in said Towns and finance said construction by granting outright to said Towns forty-five per cent. of the cost of labor and materials employed in the construction of such systems, and by the pretense of lending to said Towns, by pretended purchase

of their bonds, to be used for such financing and construction, the amounts heretofore alleged. Said grants will be pure gifts or bounties, designed solely to induce the Towns to enter into such arrangements and to insure the accom-
482 plishment of the wishes of PWA and these defendants with respect to the establishment of municipal facilities competing with and superseding the plaintiff. The said Towns have agreed in return that said funds will be made available to them upon requisition only in such amounts as defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of PWA is needed to complete the projects; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be according to the will of PWA; that all contractors and subcontractors shall be equipped with bonds and insurance as PWA desires; and defendant Ickes may cancel the agreements with the Towns at any time he wishes, if in his opinion said Towns have unreasonably delayed in carrying out any of their duties; that the aforesaid funds shall be available to the Towns only subject to the power of defendant Ickes to withhold them if he deems the Towns' budgetary situations to be unsatisfactory, or if he is not satisfied that the Towns have complied with all provisions of the agreements; and that in other respects the will of defendant Ickes shall control the Towns' actions. It is further a part of said arrangements imposed by PWA that in the construction of such projects the Town or the contractor:

(1) Shall pay a minimum wage to be fixed by law or ordinance;

(2) Shall give preference in employment to ex-service men;

(3) Shall exclude convicts from working on such project;

(4) Shall work no laborer thereon more than eight hours in any one day or more than thirty hours in any one week;

(5) Shall pay each employee on said project in full each week, without deduction of lawful set-offs against such debt;

(6) Shall give the employee on the project the right to organize and bargain collectively free from interference and discrimination because of labor affiliations;

(7) Shall report to PWA and other governmental agencies the number of persons on the payroll, rate of wages and the man hours;

(8) Shall be subject to the pains and penalties of Public Act No. 324 (48 Stat. 948) and the rules and regulations promulgated thereunder.

The said pretended bonds to be issued by the Towns, through the purchase of which the pretended loans from PWA are to be made, are not general obligations of the Towns, but it is expressly understood and agreed between said Towns, respectively, and PWA that said bonds shall not constitute an indebtedness of said Town within the meaning of any provision or limitation of the Con-
483 stitution of the State of Alabama and shall never impose a pecuniary liability upon said Towns or charge against their general credit. Said pretended bonds are payable solely from the revenue to be derived from said projects.

*Paragraph XVI*

Each of the Towns of Guntersvile, Hartselle and Russellville has exceeded its constitutional debt limit, and there is no market for the pretended income obligations of said Towns described in Paragraph XV in the general financial markets or in any special financial markets, and except for the proposed acts of the defendants, the said Towns would be unable to secure monies for said purposes.

*Paragraph XVII*

The proposed projects of the PWA defendants with the said Towns are not for a national or other public purpose for the following reasons:

(1) There is no need for the construction of an electric distribution system in said Towns since any and all possible need for electric energy and service in each of said localities is now, and for a long time past has been, and will continue to be, fully and adequately provided by private capital and enterprise and by means of capital invested in and represented by plaintiff's existing plant and equipment, which it operates as a public utility subject to the laws of the State of Alabama.

(2) The proposed projects are solely local projects confined to the area in which they are to render electric services and solely for the local and private welfare and benefit of the consumers of electricity in said area and are not and cannot be for the purpose of serving or providing any benefit for the general public of the United States, and will not and cannot promote the general welfare of the United States. The projects will, if anything, be to the general detriment of the United States by reason of creating unnecessary and wasteful duplication of electric distribution facilities and causing unemployment and loss of invested capital.

(3) The expenditure of federal funds for such projects can inure, if at all, only to the private benefit of the consumers of electricity in and about said Towns and such Towns in their private and commercial capacities, and said expenditures are solely and purely for private purposes.

(4) The only possible further benefit which could be served or promoted by the expenditure of federal funds for the proposed projects is the private and individual benefits to manufacturers and producers of material, equipment and electrical appliances to be purchased, acquired and constructed thereby, and to the builders, contractors and providers of labor to be expended in the assembling and construction thereof, and if any secondary or ultimate or incidental benefit should result from the stimulation of industry and increase of profits in the manufacture, sale, assembly, transportation and installation of materials entering into the construction of said property, the same will be merely a secondary, remote and contingent benefit, and the expenditure of public funds for such purposes will constitute a disbursement and expenditure for the private gain and profit of such manufacturers, sellers and contractors.

*Paragraph XVIII*

The federal funds employed in making loans and grants for the construction of municipal or publicly owned utilities, and particularly the funds to be employed for
484 the proposed loan and grant to the aforesaid Towns, are largely, if not wholly, monies borrowed on the credit of the United States.

*Paragraph XIX*

The threatened action of the defendants herein pursuant to the aforesaid arrangement with said Towns (including particularly the threatened loan and grant and disbursement of public funds of the United States and delivery thereof to said Towns for the purposes and uses herein set out) is illegal and unauthorized by, and contrary to, the terms and purposes of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the defendants are wholly without authority in law to perform any of the acts which said arrangements with the said Towns contemplate to be performed by them as herein alleged, because:

(1) Section 202 of the National Industrial Recovery Act as extended provides that the Administrator shall prepare a comprehensive program of public works. Section 203 provides that the Administrator may construct, finance, or aid in the construction or financing of any public works project "included in the program prepared pursuant to Section 202". PWA has announced that allotments are being and will be made before such a comprehensive program is prepared. In line with this policy, allotments have been made in the absence of the preparation of such program, no such program has ever been prepared, the allotment herein and the action of the defendants in financing and constructing the proposed plants and systems are being performed in the absence of the preparation of such a program, and the projects herein alleged have never been included in any such program. The only program ever prepared is the sum of particular projects which PWA has, from time to time, determined to carry out; this is not the preparation of a program under Section 202, but is a mere catalogue of action taken without any such program.

(2) Said projects are not reasonably designed for, or capable of, increasing employment quickly. Plaintiff avers that the amount of employment which will be given by the construction of said proposed distributing system and transmission lines will be small and temporary, wholly out of proportion to the enormous sum contemplated to be expended and to the tremendous loss and injury to plaintiff's business and property. Indeed such construction will

cause, by its inevitable impairment and possible destruction of the plaintiff's operations and business in said Towns, the unemployment of many and possibly all of those now engaged in plaintiff's operations and business in said Towns.

(3) Section 202 of the National Industrial Recovery Act, as extended, by particularly enumerating, in the list of Public Works for which public monies might be loaned and granted, the following "development of water power" and "transmission of electrical energy", has excluded from the projects included in said acts, electrical plants and systems other than water power and electricity transmission systems, such as the plants and systems contemplated by said projects. Neither said provision nor any other provision of said section authorized a publicly-owned distribution system of this sort. Furthermore the purported authority to make a grant such as that contemplated, expired on June 16, 1935, by virtue of Section 201 (d) of said Act, and such purported authority was not extended by the Emergency Relief Appropriation Act of 1935. Nor does such Act of 1935 authorize a project of this type. Among other things, this project, as heretofore alleged, will not be self-liquidating.

(4) Said pretended loans are not repaid and cannot be reasonably secured since they are to be repaid only from, and secured only by, the net earnings of the projects, which will be wholly insufficient to pay operating expenses.

485 Said projects are wholly useless and wasteful in that they duplicate plaintiff's existing, adequate systems, and because they are uneconomic and unsound in that independent systems cannot be maintained save at exorbitant rates, if at all, in said Towns, due to the small number of possible customers. The projects can result only in disastrous rate wars, destructive of both plaintiff's facilities and the projects themselves. The small demand in each of said Towns can support only one such utility. The additional projects will be not only useless but predatory; their effect will be to decrease, instead of promote the fullest possible utilization of the present productive capacity of the electrical industry, and particularly that portion of the industry carried on by plaintiff.

No unusual emergency has arisen which necessitates the making of a grant by PWA for the construction of a publicly-owned electrical plant and system at Guntersville, Hartselle and Russellville, Alabama. The conditions with respect to the rendition of electrical service in such Towns are now the same as they have been for a number of years in the past, except that substantially lower rates for such service have been made effective in recent years, and material improvements in the facilities for furnishing such service have been made. Plaintiff is adequately supplying all demands for electrical service in such Towns.

(5) Said proposed and contemplated arrangements would violate the laws of the State of Alabama in that the undertakings assumed or proposed to be assumed by the said Towns under said arrangements would, if carried out, constitute an unlawful delegation to foreign agents of their sovereign duties. More specifically, the Towns propose to surrender to these defendants complete control of the terms, manner and purpose of expenditure, the regulation of the construction and the cost thereof, the regulation of the type of labor to be used thereon, choice of contractors, laborers and other agents, the selection and approval of materials and the regulation of labor costs thereon, the regulation of rates to be charged for electricity service, and other matters, at the same time leaving to the defendants the determination of whether said funds shall be withheld and the projects remain uncompleted, and said Towns would otherwise delegate to the PWA defendants their responsibilities, duties, and power in respect to the construction, financing and operation of said plants and distribution systems.

Furthermore, the law of the State of Alabama will be violated in that the grants and loans by PWA are, for reasons heretofore and hereafter set out, invalid and therefore the Towns will be obligated immediately to refund to PWA the amount of the grants so illegally made and accepted by them and the Towns will thereby become indebted to PWA in violation of statutory provisions of the State of Alabama with respect to the manner and amounts of the indebtedness which may be legally incurred by the Towns.

(6) Said proposed and contemplated arrangements provide or will provide by their terms for the supervision, control and direction of many things by PWA subsequent to

June 30, 1937, whereas PWA by law is continued in any event, if at all, only until June 30, 1937.

(7) Said projects are undertaken by the defendants along with other similar projects for the express purpose of controlling and lowering intrastate electricity rates within each state of the United States, of fostering a policy of public ownership of intrastate electric utilization in the United States.

(8) Said projects are specifically designed to impair the value of plaintiff's property, franchises and rights by selling electricity to municipalities and customers now served by plaintiff in Alabama.

(9) No provision of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935 or of any other law of the United States authorizes any part of such funds to be loaned or granted to said Towns for the acquisition of real estate or rights of way for such distribution systems or transmission lines as are contemplated. Plaintiff is informed and believes and therefor avers that it is proposed and planned that said Towns shall use substantial amounts from said funds for the acquisition of such real estate and rights of way.

(10) Neither the National Industrial Recovery Act, 486 nor the Emergency Relief Appropriation Act of 1935, nor any other Act of Congress, authorizes the making of loans and grants to finance competitive projects, destructive to lawful private industry already established and adequately serving the public. The result of the construction of the proposed projects will be to interfere with, instead of to "promote the fullest possible utilization of the present productive capacity of industries," as required by Section 1 of the National Industrial Recovery Act. The making of loans and grants for such projects, as herein contemplated, tends to increase unfair competitive practices instead of to "eliminate unfair competitive practices" as required by said Section. Competitive projects are likewise contrary to the rules prescribed by the President of the United States under the National Industrial Recovery Act, as set forth in PWA Circular No. 1, which provides that "projects for the transmission of electric energy into territory not now served" will be preferred for grants.

(11) No provision of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, or of any other law of the United States, authorizes the PWA defendants to undertake such projects (as they are doing), for the express purposes of controlling and lowering intrastate electricity rates within each state of the United States without reference to the reasonableness of existing rates and fostering a policy of public ownership of intrastate electric properties in the United States.

(12) The grant and loan of Federal moneys to said political subdivisions, under the conditions, penalties, threats and coercion herein set forth, is an attempt by the PWA defendants to acquire for the Federal Government control over matters of a purely intrastate nature, forbidden to it by the Federal Constitution, through the device, expedient and indirect means of contractually requiring the vesting of such control in the Federal Government as a condition of the making of such grants and loans.

*Paragraph XX*

If and to the extent that said National Industrial Recovery Act as extended and/or said Emergency Relief Appropriation Act of 1935 be held in terms to confer upon said defendants or any of them, or upon any officer of the United States power to do any of the acts or things herein complained of, said acts, said purported power, and said actions and things attempted to be done in reliance thereon are unlawful, unconstitutional and void for the following reasons:

(a) Neither of said Acts nor the actions and things attempted to be done in reliance thereon are authorized by any power delegated to the Federal Government by the Constitution;

(b) The National Industrial Recovery Act as extended and the Emergency Relief Appropriation Act of 1935 severally attempt to extend Federal power over matters of intrastate commerce and State police power, including the regulation of intrastate public utilities, in contravention of the Ninth and Tenth Amendments to the Federal Constitution and constitute the taking of plaintiff's property in violation of the Fifth Amendment to the Federal Constitution;

(c) Neither Title II of the National Industrial Recovery Act as extended, nor any section thereof, nor said Emer-

gency Relief Appropriation Act of 1935, nor any section thereof, indicates any standard to guide those officers charged with the administration of said Acts, but on the contrary both delegate legislative power to the President and, under said Acts and to effectuate their purposes, the

President is permitted and does redelegate such leg-
487 islative power to PWA, and said Act permits and authorizes the President and PWA to promulgate such rules and regulations, having the effect of law, as will in his judgment best provide for the general welfare, all violative of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; and Article II, Section 1 of the Constitution of the United States;

(d) Section 12 of the Emergency Relief Appropriation Act of 1935 purports to delegate to the President of the United States the purely legislative function of determining what, if any, functions conferred upon PWA by the National Industrial Recovery Act shall be performed by PWA after June 16, 1935. PWA is an authority purported to be constituted by Act of Congress with functions specified and defined by such Act of Congress expiring, by the provisions of said National Industrial Recovery Act, June 16, 1935. Said Section 12 of the Emergency Relief Appropriation Act of 1935 seeks unlawfully to delegate the legislative power of Congress to specify the powers, authority and duties of its own creature, PWA, to the President without indicating any adequate legislative standard to guide the President in the determination of what powers, authority and duties shall be vested in PWA after June 16, 1935, in violation of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; and Article II, Section 1 of the Constitution. Accordingly, any and all acts by PWA, its officials, employees and agents, including defendant Ickes and the other defendants herein who are officials of PWA, are without warrant in law and illegal;

(e) Neither Title II of the National Industrial Recovery Act, as extended, nor any section thereof, nor said Emergency Relief Appropriation Act of 1935, nor any section thereof contains any definite appropriation by the Congress of the United States of any funds to be granted or "loaned" to the said Towns for the construction of electric distribution systems or electric transmission lines or any standard

to guide those officers charged with the administration of said laws in the determination that each of said Towns is a party or one of a class of parties for whose benefits an appropriation for any such purpose or purposes was made by the Congress and said laws and each of them delegates legislative power to select the subject of appropriations and the beneficiaries of the appropriations to the President, and under said laws and to effectuate their purpose the President is permitted to, and does redelegate such legislative power to PWA in violation of Article I, Section 1; Article I, Section 9, Clause 7; and Article II, Section 1 of the Constitution of the United States:

(f) Neither Title II of said National Industrial Recovery Act as extended, nor said Emergency Relief Appropriation Act of 1935, nor any Administrative regulation or procedure followed by PWA or the defendants in administering said Title provides for any method whereby persons whose rights will be injured and whose property will be taken by the actions of the defendants may be given an opportunity to be heard, and plaintiff has not been afforded any opportunity to be heard although the defendants herein threaten to take its property and said Acts and the actions taken thereunder by the defendants for that reason deny due process of law as a matter of procedure in violation of the Fifth Amendment to the Federal Constitution.

(g) If the said pretended loans and grants of funds are made to the Towns as aforesaid, the plaintiff will be deprived of its property without due process of law and its property will be taken without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

(h) If it be that these defendants seek and find some purported authority in the Emergency Relief Appropriation Act of 1935 further than that granted in Paragraph
488 (a) of the President's Executive Order of June 7, 1935, any such further authority is baseless and void for the reasons heretofore set out.

(i) The funds of the United States available and to be used for the projects herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such author-

ity conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said projects will not promote the general welfare of the United States, but are exclusively for the local and private welfare of the consumers of electricity in said Towns. Said projects will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful duplication of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary and incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manufacturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purpose would be merely for the private gain and profit of such manufacturers, sellers and contractors.

(j) Each of said Acts in contravention of the Ninth and Tenth Amendments to the Federal Constitution, attempt to abridge the rights of plaintiff, its officers, employees and security holders, to earn a livelihood, and to use and enjoy its properties, all located within the State of Alabama, and to derive a reasonable return therefrom.

*Paragraph XXI*

Action by these defendants in the respects herein set forth, whether in furtherance of the unlawful conspiracy herein alleged or otherwise, will amount in practical substance and effect to actual construction and operation of the projects herein complained of by these defendants without warrant in law and illegally and not by the aforesaid Towns.

*Paragraph XXII*

Plaintiff avers that its capital investment in properties located in the Towns is not less than the amounts herein set out, to wit:

| | |
|---|---|
| Guntersville | $90,000 |
| Hartselle | 70,000 |
| Russellville | 140,000 |

And a large portion of the balance of its capital investment in generating plants, transmission lines, substations and other machinery and equipment necessary in furnishing electric service to the Towns is allocable to the investment used and useful in furnishing such service.

Plaintiff avers that it has valid and subsisting contracts with each of said Towns for supplying such Towns
489 with electricity for schools, public buildings and other municipal purposes, and has valid and subsisting contracts with the inhabitants and industrial consumers in such Towns for supplying their demands for electricity. Plaintiff is informed and believes and therefore avers that each of such Towns, in the event such loans and grants are made, intend to breach its said contracts with plaintiff and take its requirements for electricity from such municipal project. Each of said Towns through its agents or servants has solicited the patronage of plaintiff's other customers for the proposed municipal project and has secured written contracts with a large part of such customers, whereby the proposed municipal project will supply such customers' electric demands for a period of ten years. PWA has full knowledge of such intent and activity of the Towns and encouraged and conspired with the Towns thus to interfere with and procure the breach of plaintiff's contracts with such Towns and with the inhabitants thereof.

If the Towns of Guntersville, Hartselle and Russellville obtain municipal distribution systems to be operated in competition with plaintiff, plaintiff will be compelled either to suffer substantial and continuous losses in its operations in such Towns or to abandon entirely its property and system therein, as shown by the fact that, instigated and directed by PWA, the agents or servants of each of the Towns have made a house-to-house canvass of plaintiff's customers in their respective Town, soliciting their patronage for the Town's proposed electric plant, and have reported to PWA that the project will not be competitive since practically all of plaintiff's customers have entered into contracts to purchase their electricity requirements from the proposed

municipal projects as soon as service therefrom can be begun.

If defendants are permitted to consummate their unlawful projects in the Towns of Guntersville, Hartselle and Russellville, plaintiff is informed and believes and therefore states that they will undertake similar projects in many other cities and towns in the State of Alabama in which plaintiff is engaged in supplying electric public utility service, and construct a large number of muncipal electric plants to be operated in ruinous competition with plaintiff.

As heretofore alleged the business of the plaintiff is made up of a combination of businesses done by it in cities, towns, and rural areas in the State of Alabama as more particularly elsewhere alleged herein, all of which are con-
490 nected with its system of transmission lines and served by its hydro generating plants. Each local business enables plaintiff better to serve the others and is incapable of withdrawal without substantial impairment of plaintiff's ability to serve the remainder of its customers. The withdrawal of a large number of these local businesses would substantially impair plaintiff's ability to continue operation as a going concern in that it would destroy, make useless, and cause to lie idle much of plaintiff's modern, efficient and valuable properties, including dams, steam plant, transmission lines, and distribution systems.

*Paragraph XXIII*

Plaintiff is informed and believes, and therefore alleges, the said defendants, aided and abetted by the said Towns and their respective officials, will, unless restrained by this court, immediately proceed with such projects of constructing said electric distribution systems in said Towns in accordance with said unlawful arrangements and will consummate the execution of said proposed and contemplated arrangements and will perform the acts and do the things therein contemplated. Said Towns have presented or are about to present to defendant Ickes or to one or more of the defendants, officers of PWA, or their agents, initial requisitions of money to be furnished pursuant to said contemplated unlawful arrangement, and said PWA defendants or the defendants Morgenthau, Julian and Allen will, unless

restrained by this court, pay over to said Towns all or a large portion of the loan and grant of public funds of the United States as contemplated to be provided in said arrangements, and will immediately take further steps in consummating said projects. Each and all of the foregoing threatened acts of said defendants will result in immediate and irreparable injury, loss and damage to plaintiff, as herein specifically alleged.

*Paragraph XXIV*

If the defendants or any of them are permitted to continue in said unlawful conspiracy or to carry out the provisions of the unlawful contemplated arrangements, or to do any or all of the acts threatened by them as hereinbefore alleged, the property right of plaintiff to operate its property and to enjoy its franchise free from injurious competition brought about by unlawful means and to conduct its intrastate business and charge rates free from unconstitutional interference and domination by an agency or agencies of the federal government, will immediately be invaded and destroyed; the value of the business of plaintiff in said Towns and of its tangible and intangible property acquired and used therein, will immediately be greatly damaged and impaired, and finally rendered utterly worthless. It will immediately be impossible for plaintiff to obtain new customers or to increase the consumption of electricity by its present customers, but on the contrary
491 plaintiff will immediately lose great numbers of its customers and must engage in a destructive rate war with the danger of being forced to retire from business; furthermore, by reason of said unlawful project it will be impossible for plaintiff to sell or otherwise to dispose of its business and property save as junk and waste.

Further, the plaintiff as a taxpayer subjected to special, rather than general tax burdens, will be specially injured as in this paragraph set forth, and will have been and, in the future will be, subjected to a deprivation of its property for a purpose without warrant in law or in the Constitution and in violation thereof.

By reason of all of the foregoing facts, the plaintiff, through unlawful interference with, injury to, and deprivation of its property and franchises, will suffer loss of its

property without compensation and without that due process of law guaranteed it by the Fifth Amendment to the Constitution of the United States, and such injury and deprivation will constitute an immediate and irreparable loss, for which it has and can have no adequate remedy at law.

*Paragraph XXV*

Plaintiff alleges that it is futile to ask the defendants to rescind their aforesaid unlawful arrangements with the said Towns and their officials. The PWA defendants, aided and abetted by the TVA, its directors, officers, agents, employees and representatives, have for nearly two years continued negotiations with such Towns to consummate some such arrangements with them and have finally induced the Towns and their officials to revise the original arrangements so as to vary substantially therefrom, and, as is herein alleged, said Towns and their officials have been continuously advised, urged and incited by the PWA defendants herein and TVA, its directors, officers, agents, employees and representatives, to press said applications and revise the same, from time to time, to conform to the desires and will of said defendants in furtherance of their unlawful conspiracy against the plaintiff herein alleged.

*Paragraph XXVI*

The said Towns of Guntersville, Hartselle and Russellville and the members of their respective governing bodies are not made parties defendant hereto for the reason that they are without the jurisdiction of this court, and service of process cannot be had upon them in the District of Columbia. The said Towns have, as hereinbefore alleged, announced their intention to aid and abet the PWA in the immediate consummation of the said project, and plaintiff is informed and believes, and therefore alleges, that
492 unless the defendants are immediately restrained from doing so they will at once perform the acts alleged herein; plaintiff is further informed and believes, and therefore alleges, that the giving of notice of application for a restraining order would precipitate said unlawful acts and that said acts would do all the mischief complained of by the plaintiff herein and would result in

immediate and irreparable injury, loss and damage to the plaintiff, whereas restraint of the doing thereof until disposition of plaintiff's application for a temporary injunction has been made would result in no detriment or injury to the defendants.

WHEREFORE, the premises considered, the plaintiff prays:

(1) That process issue against the defendants requiring them to answer this bill (but not under oath or affirmation, the benefit whereof is hereby expressly waived by the plaintiff).

(2) That this court grant plaintiff a temporary restraining order against defendants, and each of them, enjoining each and all of the defendants, their officers, agents and all persons acting in the aid of said defendants and their successors in office (in so far as they are not already restrained by order of this court), from continuing to do any acts or things in any respect in furtherance of the conspiracy herein alleged, from doing any act or thing towards the execution of said alleged unlawful arrangement for a loan and grant to the Towns of Guntersville, Hartselle and Russellville or from performing any act in contemplation thereof or pursuant thereto; and from in any manner aiding in the construction of or from financing the construction of said electric distribution systems in the Towns of Guntersville, Hartselle and Russellville; and from honoring any requisition and from transferring, lending, giving or disbursing to said Towns any funds whatsoever for the purpose of constructing or financing the construction of said electric systems.

(3) That after notice and hearing the court enter a preliminary injunction to the same effec

(4) And that upon final hearing this court enter
493 a final order and decree to the same effect.

(5) And for such other and further relief as to the court may seem meet.

ALABAMA POWER COMPANY

By P. W. TURNER

*Its Vice-President*

EDWARD B. BURLING
SPENCER GORDON
DEAN ACHESON
HOWARD C. WESTWOOD
*Solicitors for the Plaintiff,*
Union Trust Building
Washington, D. C.

NEWTON D. BAKER
*Solicitor for Plaintiff*
Cleveland, Ohio

P. W. TURNER
*Solicitor for the Plaintiff*
Birmingham, Alabama

DISTRICT OF COLUMBIA, *ss:*

494 **P. W. Turner**, being duly sworn, deposes and says that he is Vice-President of Alabama Power Company, a corporation organized under the laws of the State of Alabama, the plaintiff named in the above entitled cause, that he has authority to make this affidavit in behalf of said corporation, that he has read the foregoing amended bill of complaint by him subscribed and knows the contents thereof and that the statements therein made are true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he verily believes the statements to be true.

P. W. TURNER

Subscribed and sworn to before me this 29 day of February, 1936.

T. C. NEIDINGER,
*Notary Public.*

(Seal)

495 EXHIBIT "A"

Filed March 2, 1936
Frank E. Cunningham
Clerk

PWA Press Section
Immediate Release
Release No. 989

Achievement in certain instances of the administration purpose of making electric energy more widely available

at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration.

Municipal or local publically owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.

The statement of Administrator Ickes followed action by some privately owned utilities, which, on re-examination of their condition, found it possible to reduce rates to a point below those proposed by municipal projects plants.

In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program.

In the cases affected Public Works Administration policy will be so administered that municipal plant construction will not be deprived of the possibility of public works support until such time as the local Government feels assured the proposed rate reduction by the existing utility will be in effect on a reasonably permanent basis.

Since the Public Works program began financing electric plants, where they are socially desirable and where they will be self-liquidating, there have been reductions of rates by private utilities in different localities. The private utilities are becoming increasingly cognizant of the greater use of power resulting from lower rates.

Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable
496 where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect

rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

"Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain instances at least, are so high as to be disadvantageous to the company as well as unjust to the consumers. Experience shows that lower rates may produce larger profits particularly where promotional campaigns are conducted and the cost of electrical appliances is made reasonable.

"PWA will cooperate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect.

"State laws authorize municipal competition, hence it is PWA's position that the State has determined that such competition may be socially desirable. We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project is self-liquidating at rates lower than those which the existing utility is willing to put into effect."

497 *Answer to Second Amended Bill of Complaint*

Filed March 24, 1936.

* * * * * * *

Come now Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; John Herrick, Executive Assistant thereof; J. J. Madigan, Acting Executive Officer thereof; F. E. Schnepfe, Director of Projects

Division thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States; and Guy Allen, Chief Disbursing Officer, Division of Disbursements, Treasury Department of the United States; defendants in the above entitled case, and each of them, and for answer to the second amended bill of complaint, say:

498

I.

These defendants are informed that plaintiff is a corporation incorporated under the laws of the State of Alabama, but are without knowledge as to any of the other allegations contained in Paragraph I of the bill of complaint.

II.

Defendants Harold L. Ickes, Horatio B. Hackett, J. J. Madigan and F. E. Schnepfe (hereinafter referred to jointly as "the PWA defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them, except that they deny that they are threatening to perform any acts under pretended authority.

Defendants Henry Morgenthau, Jr., W. A. Julian and Guy Allen (hereinafter jointly referred to as "the Treasury defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them, except that they deny that the Treasurer is in control of the disbursement of public funds of the United States, and aver that he is in control only of the payment of checks drawn upon him and that, with certain minor exceptions not applicable to the instant situation, he has no control over the drawing of such checks; and further deny that they are threatening to perform any acts under pretended authority.

III.

These defendants are advised that the allegations contained in Paragraph III are conclusions of law which they are not required to answer, but if construed to be averments of fact, they deny each and every allegation thereof.

IV.

Defendants deny each and every allegation of fact contained in Paragraph IV of the bill of complaint.

V.

These defendants are without knowledge as to any of the allegations contained in Paragraph V of the bill of complaint, and demand strict proof thereof.

499

VI.

The PWA defendants are without knowledge as to the allegations of Paragraph VI of the bill of complaint, and demand strict proof thereof.

The Treasury defendants admit that plaintiff is a taxpayer of the United States, but say that information as to the amount of taxes paid, and the amount of tax liability incurred, is contained in other offices, that the necessary steps to secure said information have been taken, but that, as yet, they are without knowledge as to the accuracy of the amounts averred in Paragraph VI of the bill of complaint.

VII.

These defendants are without knowledge as to any of the allegations contained in Paragraph VII of the bill of complaint, and demand strict proof thereof.

VIII.

These defendants are without knowledge as to the allegations of Paragraph VIII of the bill of complaint, and demand strict proof thereof, except that the PWA defendants deny that by the terms of the Federal Water Power Act, or any license, agreement or understanding pursuant thereto, the plaintiff is entitled to be protected from competition in the sale of electrical energy by municipalities having a lawful right to engage in such business.

IX.

These defendants are without knowledge as to any of the allegations contained in Paragraph IX of the bill of complaint, and demand strict proof thereof.

X.

These defendants are without knowledge as to any of the allegations contained in Paragraph XI of the bill of complaint, and demand strict proof thereof.

500

XI.

These defendants are without knowledge as to any of the allegations contained in Paragraph XI of the bill of complaint, and demand strict proof thereof.

XII.

The PWA defendants deny each and every allegation contained in Paragraph XII of the Bill of Complaint.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XII of the bill of complaint, and demand strict proof thereof.

XIII.

The PWA defendants deny each and every allegation contained in Paragraph XIII of the bill of complaint, except as hereinafter admitted or qualified.

Further answering the allegations of Paragraph XIII, the PWA defendants say that they are engaged in administering the provisions of Title II of the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935; that by the terms of the Emergency Relief Appropriation Act of 1935, and Executive Orders of the President pursuant thereto, the Federal Emergency Administrator of Public Works, with the approval of the President, is authorized, for the purpose of providing work relief and to increase employment by providing for useful projects, to make loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project.

That upon the adoption of said Act, applications were received from States, municipalities, and other public bodies throughout the United states for aid in financing the construction of a large variety of useful public proj-
501 ects, including, inter alia, airports, tunnels, bridges, hospitals, jails, swimming pools, streets and high-

ways, waterworks, sewage and drainage systems, and electric generating, transmission and distribution systems; that all such applications have been carefully examined for the purpose of determining whether the application is authorized by law, and whether the project meets the requirements of the Act of Congress above referred to; that after such examination, the Federal Emergency Administrator of Public Works, with the approval of the President, has included in the comprehensive program of public works many thousands of useful public projects, and has approved the making of loans or grants, or both, to aid in financing the construction thereof, having first determined that each such loan or grant meets the requirements of the Emergency Relief Appropriation Act of 1935, and Executive Orders of the President pursuant thereto, and will effectuate the purposes of said Act.

Said defendants further say that the projects included in such comprehensive program have not been limited to a particular section of the country, the comprehensive program being national in scope; that the projects have not been limited to any particular type or class, but have been greatly diversified; that defendants have not solicited urged, or induced the construction of any particular type of useful public project, but have acted only at the instance and request of the municipality concerned; that where application is made for a loan or grant, or both, to finance or aid in financing the construction of a project which will involve competition between a municipality and a privately owned utility company, the Administrator has taken the position that it was the intention of Congress that the question of whether such competition is desirable should be left entirely to the municipality concerned; that where a grant only is made, the Administrator has not given any consideration to the question of rates to be charged by a municipality; that where, as in these cases, loans are made to be repaid out of the revenues of the project and not out of local taxes, the Administrator, in determining
502 whether the loans are reasonably secured, has considered the prospective earnings of the projects, and solely for that purpose, the rates which the municipalities proposed to charge; that the loans and grants to the cities

of Guntersville, Hartselle and Russellville were made pursuant to the policy outlined herein; that the sole aim and desire of these defendants is to carry out the mandate of Congress as set forth in the Statutes herein referred to.

The PWA defendants further allege that their activities under and pursuant to said statutes and Executive Orders have resulted in a vast increase in employment and an improvement in the national prosperity, including, among other things, a vast improvement in the credit of municipalities, an increase in the value of municipal bonds and a consequent increase in the assets of national banks and other financial institutions throughout the United States.

The PWA defendants admit that Press Release No. 989, a copy of which is attached to the second amended bill of complaint, was issued by the Press Section of the Public Works Administration on September 17, 1934, and that on July 11, 1934, the Administrator dispatched a telegram to Hon. Lee Glenn, Mayor of Florence, Alabama, a copy of which is set forth in the bill of complaint; said defendants say that such press release and telegram were not intended to and do not adequately set forth the policy of PWA with respect to municipal electric projects and at most, set forth an incomplete statement of such policy; that the true and correct policy of PWA with respect to such projects is as set forth herein.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XIII of the bill of complaint, and demand strict proof thereof.

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XIV.

The PWA defendants admit that applications were filed by the cities of Russellville, Guntersville and Hartselle, in the State of Alabama, for loans and grants to aid such cities in financing the construction of municipal electric distributing systems in such cities; that loans and grants for such purposes have been approved by the Administrator and the President in the following amounts:

| | Loan | Grant |
|---|---|---|
| Guntersville, | $48,000.00 | $39,272.00 |
| Hartselle, | 33,000.00 | 27,000.00 |
| Russellville, | 69,000.00 | 56,454.00 |

Said defendants deny each and every allegation of Paragraph XIV of the bill of complaint, except as herein specifically admitted or qualified, and further say that plaintiff has been afforded an opportunity to present its objections to the proposed projects, and that such objections were given careful consideration.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XIV of the bill of complaint, and demand strict proof thereof.

XV.

The PWA defendants aver that PWA has agreed in writing to make loans and grants to the cities of Guntersville, Hartselle, and Russellville, in the State of Alabama, to aid in financing the construction of municipal electric distributing systems; that all of the conditions of such loans and grants are contained in the Government offers, dated December 4th, 1935, and that there are no conditions, express or implied, except as set forth therein; that true and accurate copies of said offers are appended hereto and marked Exhibits "A", "B", and "C".

Said defendants deny each and every allegation contained in Paragraph XV of the bill of complaint, except as hereinabove admitted or qualified.

The Treasury defendants say that they are without
504 knowledge as to any of the allegations contained in Paragraph XV of the bill of complaint, and demand strict proof thereof.

XVI.

The PWA defendants deny each and every allegation of fact contained in Paragraph XVI of the bill of complaint.

The Treasury defendants are without knowledge as to any of the allegations of Paragraph XVI of the bill of complaint, and demand strict proof thereof.

XVII.

These defendants deny each and every allegation of fact contained in Paragraph XVII of the bill of complaint:

XVIII.

Defendants deny each and every allegation contained in Paragraph XVIII of the bill of complaint, and say that the funds of the United States are not so allocated that borrowed moneys can be distinguished from the other moneys in the Treasury.

XIX.

The PWA defendants deny each and every allegation of fact contained in Paragraph XIX of the bill of complaint, and, further answering, say that the proposed action of the cities in constructing municipal electric distributing systems and issuing obligations of the type described in Exhibits "A", "B", and "C" has been upheld as valid by the Courts of Alabama in similar cases.

The Treasury defendants deny each and every allegation of fact contained in Paragraph XIX, in so far as it pertains to them, and say that they are without knowledge of every other allegation contained therein, and demand strict proof thereof.

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XX.

These defendants deny each and every allegation of fact contained in Paragraph XX of the bill of complaint.

XXI.

These defendants deny each and every allegation of fact contained in Paragraph XXI of the bill of complaint.

XXII.

The PWA defendants say that they are without knowledge as to the allegations contained in the first, second, and last sub-paragraphs of Paragraph XXII of the bill of complaint. They also say that they are without knowledge of the allegations of the third subparagraph of Paragraph XXII of the bill of complaint, except that they deny the allegations in the last sentence thereof.

Said defendants deny each and every allegation contained in Paragraph XXII of the bill of complaint, except as hereinabove qualified.

The Treasury defendants deny the allegations contained in the fifth subparagraph of Paragraph XXII of the bill

of complaint. They say that they are without knowledge as to each and every other allegation of the bill of complaint, and demand strict proof thereof.

XXIII.

The PWA defendants admit that, unless restrained, they will make loans and grants to the cities of Guntersville, Hartselle and Russellville, in accordance with the terms of the offers (Exhibits A, B, and C), but deny all other allegations of Paragraph XXIII of the bill of complaint.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, on moneys appropriated by Congress, but deny each and every other allegation of fact pertaining to them,
506 contained in Paragraph XXIII of the bill of complaint, and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

XXIV.

The PWA defendants deny each and every allegation of fact contained in Paragraph XXIV of the bill of Complaint; but the Treasury defendants say that they are without knowledge as to any of said allegations and demand strict proof thereof.

XXV.

The PWA defendants deny each and every allegation of fact contained in Paragraph XXV of the bill of complaint; but the Treasury defendants say that they are without knowledge as to any of said allegations and demand strict proof thereof.

XXVI.

These defendants admit that the cities of Guntersville, Hartselle, and Russellville, and members of their governing bodies are without the jurisdiction of this court and that service of process cannot be had upon them in the District of Columbia.

They further admit that unless restrained they will make loans and grants to such cities in acordance with the terms of the offers (Exhibits A, B, and C).

They deny each and every allegation of fact contained in Paragraph XXVI of the Bill of Complaint except as expressly admitted herein.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, on moneys appropriated by the Congress, but deny each and every other allegation of fact pertaining to them,
507 contained in Paragraph XXVI of the bill of complaint, and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

WHEREFORE, the premises considered, these defendants jointly and severally pray that the bill of complaint be dismissed, with proper costs and charges.

JAMES W. MORRIS,
*Assistant Attorney General.*

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

JOHN W. SCOTT,
*Special Assistant to the Attorney General.*

JEROME N. FRANK,
*Counsel for Federal Emergency Administration of Public Works.*

*Attorneys for Defendants.*

Receipt of copy of the foregoing answer is hereby acknowledged on the 24th day of March, 1936.

HOWARD C. WESTWOOD
24th of March, '36.
*Counsel for Plaintiff.*

508 *Exhibit A to answer to seconded amended bill of complaint.*

Copy Conformed to
Executed Original

Legal Division, P. W. A. P. W. 46103-2

Checked Rice Date Dec 6 1935.

Federal Emergency Administration
of Public Works

Washington, D. C.,
December 4, 1935.

PWA Docket No. 7341.

City of Guntersville,
Marshall County, Alabama.

Filed March 24, 1936
Frank E. Cunningham
Clerk

1. The United States of America (herein called the "Government") hereby offers to aid in financing the construction of an electric distribution system, substation and street lights (herein called the "Project") by making a loan and grant to the City of Guntersville, Alabama (herein called the "Applicant") in an amount not exceeding in the aggregate the sum of $87,272.

2. The Government will purchase, at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $48,000, less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Guntersville;

(b) Type: Special obligations, electric revenue, serial, coupon bond;

(c) Denomination: $1,000; (d) Date: December 1, 1935;

(e) Interest rate and interest payment dates: Four percent per annum, payable semiannually on June 1 and December 1 in each year;

(f) Place of payment: At the office of the City Treasurer, Guntersville, Alabama;

(g) Registration privileges: At the option of the holder; as to principal only;

(h) Maturities: On December 1 in years and amounts as follows:

| | |
|---|---|
| 1939-1940, inclusive | $1,000, |
| 1941-1944, inclusive | 2,000, |
| 1945-1950, inclusive | 3,000, |
| 1951-1955, inclusive | 4,000; |

(i) Security: Payable as to both principal and in-
509 terest solely from and secured by a first pledge of the revenues derived from the operation of the Project, after the deduction of sums sufficient to provide for the reasonable cost of operation and maintenance thereof.

3. The Government will make the grant in an amount equal to forty-five percent (45%) of the cost of the Project upon completion, but not to exceed, in any event, the sum of $39,272.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as heretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the project for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificates of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificates of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with the Emergency Relief Appropriation Act of 1935 in all other respects.

5. *Interest of Member of Congress.* No member of or Delegate to the Congress of the United States of America shall be allowed to participate in any agreement arising from the performance of this offer or in the funds hereby made available for the construction of the Project, or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or Commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to aid in the sale by the Government of any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 15 percent of the estimated cost of the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands,

easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment for Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 25 percent of said previously estimated cost of the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 35 percent of the cost of the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after com-
511 pleting the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 45 percent of the actual cost of the Project upon completion, but not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete

and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grant, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest possible bidder pursuant to public advertisement and that every oppor-

tunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. When such a specification
512 is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of the project, except in those cases in which it is required by the law of Alabama that the protection for labor and materialmen be provided by a bond separate from the performance bond. In such case a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance

shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract document. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions therefor, may, if the applicant so desires, be inserted verbatim in such construction contract).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the Project, excepting only such rights as they may have as holder of such bonds under the laws and Constitution of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understand-
513 ing that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project, or to the financing or the construction thereof.

UNITED STATES OF AMERICA

*Federal Emergency Administrator of Public Works*

By (Sgd.) HORATIO B. HACKETT
*Assistant Administrator.*

514 P.W.-L-Form No. 48.

EXHIBIT "A"

1. *Employment Services and Labor Preferences.* With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2 (Executive Order No. 7060, approved by the President June 5, 1935):

(a) Such persons shall be referred for assignment to such work by the United States Employment Service, and

(b) Preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least 90 percent of the persons employed on any project shall have been taken from the public relief rolls:

Provided, however, that, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service.

2. *Qualifications for Employment.* (a) No persons currently serving sentence to a penal or correctional institution shall be employed on the project.

(b) No person under the age of sixteen (16) years, and no one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety or others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

(c) Except as specifically provided above, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any grounds whatsoever. The contractor may dismiss any employee not qualified to perform the work for which he has been referred, subject to disapproval by the Owner.

(d) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or

in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

3. *Hours of Work.* (a) Except in case of emer-
515 gency:

(1) The maximum hours of work for manual labor shall be 8 hours per day and 130 hours per month. On projects located at points so remote and inaccessible that camps or floating plants are necessary, the maximum hours of work for manual labor shall be 8 hours per day and 40 hours per week.

(2) The maximum hours of work for cooks, camp assistants, and clerical and other nonmanual employees such as watchmen, policemen, and messengers, shall be 8 hours per day and 40 hours per week.

(3) Administrative and supervisory employees, including executive employees, timekeepers, and storekeepers, who perform in a work-week not more than 15 hours of manual labor (or, in case the project is being constructed on a 40-hour week basis, not more than 20 hours) shall not be subject to any limitation of hours of work.

(4) Wherever practicable, the contractor shall perform the work in at least double shifts of labor, unless otherwise provided in this contract. The contractor shall not knowingly employ under this contract any person engaged in any other gainful occupation whose weekly hours of labor on such occupation, together with his hours of labor on the project, exceed the limitations of hours prescribed for employees of his classification under this contract.

(b) Nothing in these regulations is intended to authorize hours or days of work in excess of the limitations of any applicable law or regulation.

4. *Wages and Pay Rolls.* (a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

| Trade or Occupation | Hourly Wage Rate |
|---|---|
| ..... | ..... |
| ..... | ..... |

(Insert Wage Schedule Here)

..... .....

..... .....

If after the award of this contract it becomes nec-
516 essary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classification of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full, at least once each week within 3 days after the close of the pay roll period, in lawful money of the United States: Provided, however, that this paragraph shall not be construed to prohibit deductions required by law and collection of obligations by legal process.

(d) A clearly legible statement of the minimum wage rate to be paid each trade and occupation employed under this contract and of the authorized deductions therefrom, if any, shall be posted by the contractor in a prominent and easily accessible place at the site of the work.

(e) The contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the day following the payment of the wages a certified legible copy of each pay roll, whether paid by the contractor or any subcontractor, shall be transmitted by the contractor to such office as may be designated by the Works Progress Administration. The contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project. Such payrolls shall be sworn to in accordance

with the "Regulations Issued Pursuant to So-called Kickback Statute", issued jointly by the Secretary of the Treasury and the Secretary of the Interior on January 12, 1935, a copy of which is herein elsewhere set forth.

5. *Accident Prevention.* Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, building and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

6. *Insurance.* The contractor shall not commence
517 work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.* The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection afforded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide, and shall cause each subcontractor to provide, ..... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.* The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise

from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $ for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $ , on account of one accident, and Property Damage Insurance in an amount not less than $

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under subparagraph (b) hereof or by separate policies of insurance in amounts as follows:

..... .....

..... .....

7. *Materials.* (a) *Domestic.* Unless contrary to
518 law, in the performance of this contract the contractor, subcontractors, materialmen or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100 per cent will apply;

On purchases where the foreign bid exceeds $100, but is less than $10,000, a differential of 25 per cent will apply;

On purchases where the foreign bid is $10,000 or more, a differential of 15 per cent will apply.

(b) *Convict Made.* No materials manufactured or produced in a penal or correctional institution shall be used on or incorporated in the project, unless required by law.

8. *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

9. *Department of Labor Reports.* The contractor and each subcontractor shall report to the United States Department of Labor monthly, within five days after the close of each calendar month upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls and the man-hours worked, and an itemized statement of the total expenditures for materials. The contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

10. *Payments.* (a) The contractor shall provide
519 all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the Project, and the balance of

the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within five days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

(c) Within the first 15 days of each calendar month the Owner will make partial payment to the contractor for work performed during the preceding calendar month on estimate certified by the contractor, the Owner, and the Government Inspector. Except as otherwise provided by law, 10 per cent of each approved estimate shall be retained by the Owner until final completion and acceptance of all work covered by this contract, provided that at any time after 50 per cent of the work covered by this contract has been completed, if progress satisfactory to the Owner and the Government Inspector is being made in accordance with the terms of this contract, subsequent approved estimates will be paid in full unless otherwise provided in this contract.

(d) Compliance with the provisions of subparagraphs (a) and (b) of this paragraph is a condition precedent to partial payment under sub-paragraph (c) hereof.

11. *Wage Claims and Adjustments.* In cases of underpayment of wages, the Owner will withhold from the contractor out of payments due an amount sufficient to pay persons employed on the work covered by this contract the difference between the wages required to be paid under this contract and the wages actually paid such employees for the total number of hours worked. The amounts withheld shall be disbursed by the Owner, for and on account of the contractor, to the respective employees to whom they are due.

12. *Signs.* The contractor shall furnish signs
520 bearing the legend:

"Federal Works Project No. .....
Public Works Administration"

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

13. *Subcontracts.* (a) The contractor shall perform, directly and without subcontracting, not less than 25 per cent of the construction, to be calculated on the basis of the total contract price. No part of this contract shall be sublet without the approval of the Owner.

(b) If the contractor shall sublet any part of this contract, the contractor shall be as fully responsible to the Owner for the acts and omissions of his subcontractor and of the persons either directly or indirectly employed by his subcontractor, as he is for the acts and omissions of persons directly employed by himself.

(c) Paragraphs 1 to 5 inclusive, 7 to 10 inclusive, 11 (a) and (b), 17, 18, 19, the Regulations Issued Pursuant to So-called "Kick Back Statute" and the penalty clauses set forth in Section 9 of the Act and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

14. *Assignment of Contract.* The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor without the consent of surety unless the surety has waived its right to notice of assignment.

15. *Termination for Breach.* In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any ex-

cess cost occasioned the Owner thereby, and in such
521 event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

16. *Priority of Construction Regulations.* Any provisions of this contract in conflict or inconsistent with the requirements of Exhibit "A" except such provisions as are required by applicable law or regulation, shall be void to the extent of such conflict or inconsistency.

17. *Definitions.* The follow .g terms as used in this contract are respectively defined as follows:

"Act": The Emergency Relief Appropriation Act of 1935.

"P. W. A." or "Public Works Administration": The Federal Emergency Administration of Public Works.

"Administrator": The Federal Emergency Administrator of Public Works.

"State Director": State Director (P.W.A.), his duly authorized representative or any person designated by the Administrator to perform his duties or functions.

"Owner": The public body, agency or instrumentality which is a party hereto and for which this contract is to be performed.

"Emergency": A temporary unforeseen occurrence or combination of circumstances which endangers life or property and calls for immediate action or remedy.

"Material": Materials incorporated in the project, or used or consumed in the performance of the work.

"Subcontractor": A person, firm, or corporation supplying labor and materials or labor for work at the site of the project.

"Work at Site of Project": Work to be performed, including work normally done, on the location of the project.

18. *Paragraphs 1, 2(a), (b) and (c), 3(a) (1) and (2), 4(e), 8(a) and 10 incorporate rules and regulations issued by the President under the authority of section 6 of the Act. Any willful violation of any such rule or regulation is punishable by fine of not to exceed $1,000.*

## 522 REGULATIONS ISSUED PURSUANT TO SO-CALLED "KICK-BACK STATUTE"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of.....

County of....., *ss:*

I, ..... (name the party signing affidavit) .....(Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full
523 weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of .....(project), for the weekly pay roll period from the .... day of ....., 193 , to the .... day of ....., 193 ; that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this .... day of ....., 193 ..

Section 3. Said affidavit shall be executed and sworn to by the officer of employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be

filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective 524 on January 15, 1935.

The clause in the pay-roll affidavit which reads "* * * that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called Kickback Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unem-

ployment, or other similar benefits voluntarily authorized by permanent employees of equipment suppliers engaged in installation of the equipment at the site of the project.

## PENALTY

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both".

Section 35 of the Criminal Code, as amended, pro-
525 vides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

526 *Exhibit B to Answer to Second Amended Bill of Complaint*

Copy conformed to
Executed Original
Legal Division, P. W. A.
Checked Rice Date Dec 6 1935

P. W. 46103-4

Federal Emergency Administration
of Public Works

Washington, D. C.,
December 4, 1935.
PWA Docket No. 6611.

City of Hartselle,
Morgan County, Alabama.

Filed March 24, 1936
Frank E. Cunningham
*Clerk*

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of an electric distribution and street lighting system (herein called the "Project") by making a loan and grant to the City of Hartselle (herein called the "Applicant") not exceeding in the aggregate the sum of $60,000.

2. *Method of Making Loan.* The Government will purchase at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $33,000 less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Hartselle;

(b) Type: Negotiable, special obligation, serial, coupon bonds;

(c) Denomination: $1,000; (d) Date: October 1, 1935;

(e) Interest rate and interest payment dates: Four percent (4%) per annum, payable semi-annually on the first days of April and October in each year until maturity;

(f) Place of payment: At the office of the Treasurer of the City of Hartselle, Alabama;

(g) Registration privileges: At the option of the holder as to principal only;

(h) Maturities: On the first day of October in years, all inclusive, and amounts as follows:

| Years | Amounts |
|---|---|
| 1937 to 1941, | $1,000, |
| 1942 to 1955, | 2,000; |

527 (i) Security: Payable as to both principal and interest solely from and secured by a first-pledge of the revenues derived from the operation of the Project after the deduction of sums sufficient to provide for the reasonable cost of operation and maintenance thereof.

3. The Government will make the grant in an amount equal to forty-five (45%) per cent of the cost of the Project upon completion, but not to exceed, in any event, the sum of $27,000.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the Project for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with the Emergency Relief Appropriation Act of 1935 in all other respects.

5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in any agreement arising

from the performance of this offer or in the funds hereby made available for the construction of the Project, or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 per
528 cent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 per cent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 15 per cent of the estimated cost of the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, boring and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-ways. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment for Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 25 per cent of said previously estimated cost of the Project. When the Project shall be approximately 70 per cent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 35 per cent of the cost of the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be hon-
529 ored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 45 per cent of the actual cost of the Project upon completion, but not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account")

shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a Project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise
530 of the name of a proprietary product or the name

of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, them term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons suplying labor and furnishing materials for the construction of the project, except in those cases in which it is required by the law of Alabama that protection for labor and materialmen be provided by a bond separate from the performance bond. In such case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desire, be inserted verbatim in such construction contract).

13. The Administrator and the Government shall
531 have no rights or power of any kind with respect to the rates to be fixed or charged by the Project, excepting only such rights as they may have as a holder of such bonds under the laws and Constitution of Alabama and the lawful proceedings of the applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project, or to the financing or the construction thereof.

UNITED STATES OF AMERICA
*Federal Emergency Administrator of Public Works*

By (Sgd.) HORATIO B. HACKETT,
*Assistant Administrator.*

P. W.-L-Form No. 48.

532 EXHIBIT "A"

1. *Employment Services and Labor Preferences.* With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2 (Executive Order No. 7060, approved by the President June 6, 1935):

(a) Such persons shall be referred for asignment to such work by the United States Employment Service, and

(b) Preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least 90 per cent of the persons employed on any project shall have been taken from the public relief rolls:

Provided, however, that, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service.

2. *Qualifications for Employment.* (a) No persons currently serving sentence to a penal or correctional institution shall be employed on the project.

(b) No person under the age of sixteen (16) years, and no one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety of others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

(c) Except as specifically provided above, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any grounds whatsoever. The contractor may dismiss any employee not qualified to perform the work for which he has been referred, subject to disapproval by the Owner.

(d) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

3. *Hours of Work.* (a) Except in case of emer-
533 gency:

(1) The maximum hours of work for manual labor

shall be 8 hours per day and 130 hours per month. On projects located at points so remote and inaccessible that camps or floating plants are necessary, the maximum hours of work for manual labor shall be 8 hours per day and 40 hours per week.

(2) The maximum hours of work for cooks, camp assistants, and clerical and other nonmanual employees such as watchmen, policemen, and messengers, shall be 8 hours per day and 40 hours per week.

(3) Administrative and supervisory employees, including executive employees, timekeepers, and storekeepers, who perform in a work-week not more than 15 hours of manual labor (or, in case the project is being constructed on a 40-hour week basis, not more than 20 hours) shall not be subject to any limitation of hours of work.

(4) Wherever practicable, the contractor shall perform the work in at least double shifts of labor, unless otherwise provided in this contract. The contractor shall not knowingly employ under this contract any person engaged in any other gainful occupation whose weekly hours of labor on such occupation, together with his hours of labor on the project, exceed the limitations of hours prescribed for employees of his classification under this contract.

(b) Nothing in these regulations is intended to authorize hours or days of work in excess of the limitations of any applicable law or regulation.

4. *Wages and Pay Rolls.* (a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

| Trade or Occupation | Hourly Wage Rate |
|---|---|
| ..... | ..... |
| ..... | ..... |

(Insert Wage Schedule Here)

| | |
|---|---|
| ..... | ..... |
| ..... | ..... |

534 If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates

and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classification of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full, at least once each week within 3 days after the close of the pay roll period, in lawful money of the United States: Provided, however, that this paragraph shall not be construed to prohibit deductions required by law and collection of obligations by legal process.

(d) A clearly legible statement of the minimum wage rate to be paid each trade and occupation employed under this contract and of the authorized deductions therefrom, if any, shall be posted by the contractor in a prominent and easily accessible place at the site of the work.

(e) The contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the day following the payment of the wages a certified legible copy of each pay roll, whether paid by the contractor or any subcontractor, shall be transmitted by the contractor to such office as may be designated by the Works Progress Administration. The contractor and each subcontractor shall submit reports at such time and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project. Such pay rolls shall be sworn to in accordance with the "Regulations Issued Pursuant to So-called Kick-back Statute", issued jointly by the Secretary of the Treasury and the Secretary of the Interior on January 12, 1935, a copy of which is herein elsewhere set forth.

5. *Accident Prevention.* Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, building and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety

provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

6. *Insurance.* The contractor shall not commence
535 work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.* The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection afforded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide, and shall cause each subcontractor to provide, ..... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.* The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $ for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $ , on account of one accident, and Property Damage Insurance in an amount not less than $

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under subparagraph (b) hereof or by separate policies of insurance in amounts as follows:

..... .....
..... .....

536 7. *Materials.* (a) *Domestic.* Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100 per cent will apply;

On purchases where the foreign bid exceeds $100, but is less than $10,000, a differential of 25 per cent will apply;

On purchases where the foreign bid is $10,000 or more, a differential of 15 per cent will apply.

(b) *Convict Made.* No materials manufactured or produced in a penal or correctional institution shall be used on or incorporated in the project, unless required by law.

8. *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this con-

tract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

9. *Department of Labor Reports.* The contractor and each subcontractor shall report to the United States Department of Labor monthly, within five days after the close of each calendar month upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls and the man-hours worked, and an itemized statement of the total expenditures for materials. The contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

10. *Payments.* (a) The contractor shall provide all
537 labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the Project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within five days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

(c) Within the first 15 days of each calendar month the Owner will make partial payment to the contractor for work performed during the preceding calendar month on estimate certified by the contractor, the Owner, and the Government Inspector. Except as otherwise provided by law, 10 per cent of each approved estimate shall be retained by the Owner until final completion and acceptance of all work covered by this contract, provided that at any time after 50 per cent of the work covered by this contract has been completed, if progress satisfactory to the Owner and the Government Inspector is being made in accordance with the terms of this contract, subsequent approved estimates will be paid in full unless otherwise provided in this contract.

(d) Compliance with the provisions of subparagraphs (a) and (b) of this paragraph is a condition precedent to partial payment under subparagraph (c) hereof.

11. *Wage Claims and Adjustments.* In cases of underpayment of wages, the Owner will withhold from the contractor out of payments due an amount sufficient to pay persons employed on the work covered by this contract the difference between the wages required to be paid under this contract and the wages actually paid such employees for the total number of hours worked. The amounts withheld shall be disbursed by the Owner, for and on account of the contractor, to the respective employees to whom they are due.

12. *Signs.* The contractor shall furnish signs
538 bearing the legend:

"Federal Works Project No.....
Public Works Administration"

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

13. *Subcontracts.* (a) The contractor shall perform, directly and without subcontracting, not less than 25 per cent of the construction, to be calculated on the basis of the total contract price. No part of this contract shall be sublet without the approval of the Owner.

(b) If the contractor shall sublet any part of this contract, the contractor shall be as fully responsible to the Owner for the acts and omissions of his subcontractor and

of the persons either directly or indirectly employed by his subcontractor, as he is for the acts and omissions of persons directly employed by himself.

(c) Paragraphs 1 to 5 inclusive, 7 to 10 inclusive, 11 (a) and (b), 17, 18, 19, the Regulations Issued Pursuant to So-called "Kick Back Statute" and the penalty clauses set forth in Section 9 of the Act and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

14. *Assignment of Contract.* The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor without the consent of surety unless the surety has waived its right to notice of assignment.

15. *Termination for Breach.* In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such security of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the
539 Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

16. *Priority of Construction Regulations.* Any provisions of this contract in conflict or inconsistent with the requirements of Exhibit "A", except such provisions as are required by applicable law or regulation, shall be void to the extent of such conflict or inconsistency.

17. *Definitions.* The following terms as used in this contract are respectively defined as follows:

"Act": The Emergency Relief Appropriation Act of 1935.

"P. W. A." or "Public Works Administration": The Federal Emergency Administration of Public Works.

"Administrator": The Federal Emergency Administrator of Public Works.

"State Director": State Director (P.W.A.), his duly authorized representative or any person designated by the Administrator to perform his duties or functions.

"Owner": The public body, agency or instrumentality which is a party hereto and for which this contract is to be performed.

"Emergency": A temporary unforeseen occurrence or combination of circumstances which endangers life or property and calls for immediate action or remedy.

"Material": Materials incorporated in the project, or used or consumed in the performance of the work.

"Subcontractor": A person, firm, or corporation supplying labor and materials or labor for work at the site of the project.

"Work at Site of Project": Work to be performed, including work normally done, on the location of the project.

18. *Paragraphs 1, 2(a), (b) and (c), 3(a) (1) and (2), 4(e), 8(a) and 10 incorporate rules and regulations issued by the President under the authority of section 6 of the Act. Any willful violation of any such rule or regulation is punishable by fine of not to exceed $1,000.*

540 *Regulations Issued Pursuant to So-Called "Kick-Back Statute"*

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of.....

County of....., ss:

I, ..... (name the party signing affidavit) .....: ..... (Title), do hereby certify that I am (the employee of)..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the
541 attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of..... (project), for the weekly pay roll period from the ..... day of ....., 193 , to the ..... day of ....., 193 ; that no rebates or deductions from any wages due any such person as set out on

the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement, or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of ....., 193 .

Section 3. Said affidavit shall be executed and sworn to by the officer of employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the

Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective
542 on January 15, 1935.

The clause in the pay-roll affidavit which reads "* * * that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called Kickback Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment suppliers engaged in installation of the equipment at the site of the project.

*Penalty*

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any money appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits

to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both".

Section 35 of the Criminal Code, as amended, pro-
543 vides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

544 *Exhibit C to Answer to Second Amended Bill of Complaint.*

Copy Conformed to
Executed Original

Legal Division, P. W. A. P. W. 46103-3
Checked Rice Date Dec 6 1935

Federal Emergency Administration of Public Works

Washington, D. C.,
December 4, 1935,
PWA Docket No. 7032.

City of Russellville,
Franklin County, Alabama.

Filed March 24, 1936.
Frank E. Cunningham,
*Clerk.*

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of an electric distribution, street lighting and whiteway system (herein called the "Project") by making a loan and grant to the City of Russellville, Alabama (herein called the "Applicant") in an amount not exceeding in the aggregate the sum of $125,454.

2. *Method of Making Loan.* The Government will purchase, at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth

below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $69,000, less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Russellville;

(b) Type: Special obligation, electric revenue, serial, coupon bond;

(c) Denomination: $1,000; (d) Date: December 1, 1935;

(e) Interest rate and interest payment dates: Four percent per annum, payable semi-annually on June 1 and December 1 in each year;

(f) Place of payment: At the office of the City Treasurer, Russellville, Alabama;

(g) Registration privileges: At the option of the holder, as to principal only;

(h) Maturities: On December 1 in years and amounts as follows:

| | |
|---|---|
| 1939-1940, inclusive | $2,000; |
| 1941-1943, inclusive | 3,000; |
| 1944-1947, inclusive | 4,000; |
| 1948-1955, inclusive | 5,000; |

(i) Security: Payable as to both principal and
545 interest solely from and secured by a first pledge of the revenues derived from the operation of the Project, after the deduction of sums sufficient to provide for the reasonable cost of operation and maintenance thereof.

3. The Government will make the grant in an amount equal to forty-five percent (45%) of the cost of the Project upon completion, but not to exceed in any event the sum of $56,454.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it hereinoffers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the Project for the sum allotted by the Government, or that the Applicant will not be able

to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purpose as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with the Emergency Relief Appropriation Act of 1935 in all other respects.

5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in any agreement arising from the performance of this offer or in the funds hereby made available for the construction of the Project, or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all
546 such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 15 percent of the estimated cost of the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings, and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment for Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 25 percent of said previously estimated cost of the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 35 percent of the cost of the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof. The intermediate grant
547 requisitions will be honored if the documents neces-

sary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 45 per cent of the actual cost of the Project upon completion, but not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any, of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under
548 contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal" is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of the project, except in those cases in which it is required by the law of Alabama that protection for labor and materialmen be provided by a bond separate from the performance bond. In such case, a performance bond in an amount equal to 100% of the contract price sup-

plemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly
549 as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desire, be inserted verbatim in such construction contract).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the Project, excepting only such rights as they may have as a holder of such bonds under the laws and Constitution of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and

the Government or any of its agencies in any way relating to said Project, or to the financing or the construction thereof.

UNITED STATES OF AMERICA
*Federal Emergency Administrator of Public Works*

By (Sgd.) HORATIO B. HACKETT,
*Assistant Administrator.*

P. W.-L-Form No. 48.

550 *Exhibit "A"*

1. *Employment Services and Labor Preferences.* With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2 (Executive Order No. 7060, approved by the President June 5, 1935):

(a) Such persons shall be referred for assignment to such work by the United States Employment Service, and

(b) Preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least 90 percent of the persons employed on any project shall have been taken from the public relief rolls:

Provided, however, that, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service.

2. *Qualifications for Employment.* (a) No persons currently serving sentence to a penal or correctional institution shall be employed on the project.

(b) No person under the age of sixteen (16) years, and no one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety of others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

(c) Except as specifically provided above, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any grounds whatsoever. The contractor may dismiss any employee not

qualified to perform the work for which he has been referred, subject to disapproval by the Owner.

(d) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

3. *Hours of Work.* (a) Except in case of emer-
551 gency:

(1) The maximum hours of work for manual labor shall be 8 hours per day and 130 hours per month. On projects located at points so remote and inaccessible that camps or floating plants are necessary, the maximum hours of work for manual labor shall be 8 hours per day and 40 hours per week.

(2) The maximum hours of work for cooks, camp assistants, and clerical and other nonmanual employees such as watchmen, policemen, and messengers, shall be 8 hours per day and 40 hours per week.

(3) Administrative and supervisory employees, including executive employees, timekeepers, and storekeepers, who perform in a work-week not more than 15 hours of manual labor (or, in case the project is being constructed on a 40-hour week basis, not more than 20 hours) shall not be subject to any limitation of hours of work.

(4) Wherever practicable, the contractor shall perform the work in at least double shifts of labor, unless otherwise provided in this contract. The contractor shall not knowingly employ under this contract any person engaged in any other gainful occupation whose weekly hours of labor on such occupation, together with his hours of labor on the project, exceed the limitations of hours prescribed for employees of his classification under this contract.

(b) Nothing in these regulations is intended to authorize hours or days of work in excess of the limitations of any applicable law or regulation.

4. *Wages and Pay Rolls.* (a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

| Trade or Occupation | Hourly Wage Rate |
|---|---|
| ..... | ..... |
| ..... | ..... |

(Insert Wage Schedule Here)

| | |
|---|---|
| ..... | ..... |
| ..... | ..... |

If after the award of this contract it becomes
552 necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classification of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full, at least once each week within 3 days after the close of the pay roll period, in lawful money of the United States: Provided, however, that this paragraph shall not be construed to prohibit deductions required by law and collection of obligations by legal process.

(d) A clearly legible statement of the minimum wage rate to be paid each trade and occupation employed under this contract and of the authorized deductions therefrom, if any, shall be posted by the contractor in a prominent and easily accessible place at the site of the work.

(e) The contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the day following the payment of the wages a certified legible copy of each pay roll, whether paid by the contractor or any subcontractor, shall be transmitted by the contractor to such office as may be designated by the Works Progress Administration. The

contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project. Such pay rolls shall be sworn to in accordance with the "Regulations Issued Pursuant to So-called Kick-back Statute", issued jointly by the secretary of the Treasury and the Secretary of the Interior on January 12, 1935, a copy of which is herein elsewhere set forth.

5. *Accident Prevention.* Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, building and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

6. *Insurance.* The contractor shall not commence
553 work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.* The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection afforded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide, and shall cause each subcontractor to provide, ..... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.* The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $ for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $ , on account of one accident, and Property Damage Insurance in an amount not less than $

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under subparagraph (b) hereof or by separate policies of insurance in amounts as follows:

..... .....

..... .....

7. *Materials.* (a) *Domestic.* Unless contrary to
554 law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased if the foreign materials, articles, or supplies are lower in

cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100 per cent will apply;

On purchases where the foreign bid exceeds $100, but is less than $10,000, a differential of 25 per cent will apply;

On purchases where the foreign bid is $10,000 or more, a differential of 15 per cent will apply.

(b) *Convict Made.* No materials manufactured or produced in a penal or correctional institution shall be used on or incorporated in the project, unless required by law.

8. *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

9. *Department of Labor Reports.* The contractor and each subcontractor shall report to the United States Department of Labor monthly, within five days after the close of each calendar month upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls and the man-hours worked, and an itemized statement of the total expenditures for materials. The contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

10. *Payments.* (a) The contractor shall provide
555 all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month fol-

lowing the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the Project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within five days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

(c) Within the first 15 days of each calendar month the Owner will make partial payment to the contractor for work performed during the preceding calendar month on estimate certified by the contractor, the Owner, and the Government Inspector. Except as otherwise provided by law, 10 per cent of each approved estimate shall be retained by the Owner until final completion and acceptance of all work covered by this contract, provided that at any time after 50 per cent of the work covered by this contract has been completed, if progress satisfactory to the Owner and the Government Inspector is being made in accordance with the terms of this contract, subsequent approved estimates will be paid in full unless otherwise provided in this contract.

(d) Compliance with the provisions of subparagraphs (a) and (b) of this paragraph is a condition precedent to partial payment under subparagraph (c) hereof.

11. *Wage Claims and Adjustments.* In cases of underpayment of wages, the Owner will withhold from the contractor out of payments due an amount sufficient to pay persons employed on the work covered by this contract the difference between the wages required to be paid under this contract and the wages actually paid such employees for the total number of hours worked. The amounts withheld shall be disbursed by the Owner, for and on account of the contractor, to the respective employees to whom they are due.

12. *Signs.* The contractor shall furnish signs bear-
556 ing the legend:

"Federal Works Project No.....
Public Works Administration"

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

13. *Subcontracts.* (a) The contractor shall perform, directly and without subcontracting, not less than 25 per cent of the construction, to be calculated on the basis of the total contract price. No part of this contract shall be sublet without the approval of the Owner.

(b) If the contractor shall sublet any part of this contract, the contractor shall be as fully responsible to the Owner for the acts and omissions of his subcontractor and of the persons either directly or indirectly employed by his subcontractor, as he is for the acts and omissions of persons directly employed by himself.

(c) Paragraphs 1 to 5 inclusive, 7 to 10 inclusive, 11 (a) and (b), 17, 18, 19, the Regulations Issued Pursuant to So-called "Kick Back Statute" and the penalty clauses set forth in Section 9 of the Act and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

14. *Assignment of Contract.* The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor without the consent of surety unless the surety has waived its right to notice of assignment.

15. *Termination for Breach.* In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the

date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occa-
557 sioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

16. *Priority of Construction Regulations.* Any provisions of this contract in conflict or inconsistent with the requirements of Exhibit "A", except such provisions as are required by applicable law or regulation, shall be void to the extent of such conflict or inconsistency.

17. *Definitions.* The following terms as used in this contract are respectively defined as follows:

"Act": The Emergency Relief Appropriation Act of 1935.

"P.WA." or "Public Works Administration": The Federal Emergency Administration of Public Works.

"Administrator": The Federal Emergency Administrator of Public Works.

"State Director": State Director (P.W.A.), his duly authorized representative or any person designated by the Administrator to perform his duties or functions.

"Owner": The public body, agency or instrumentality which is a party hereto and for which this contract is to be performed.

"Emergency": A temporary unforeseen occurrence or combination of circumstances which endangers life or property and calls for immediate action or remedy.

"Material": Materials incorporated in the project, or used or consumed in the performance of the work.

"Subcontractor": A person, firm, or corporation supplying labor and materials or labor for work at the site of the project.

"Work at Site of Project": Work to be performed, including work normally done, on the location of the project.

18. *Paragraphs 1, 2(a), (b) and (c), 3(a) (1) and (2), 4(e), 8(a) and 10 incorporate rules and regulations issued by the President under the authority of section 6 of the Act. Any willful violation of any such rule or regulation is punishable by fine of not to exceed $1,000.*

558 *Regulations Issued Pursuant to So-Called "Kick-Back Statute"*

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....
County of ....., ss:

I, ..... (name the party signing affidavit) ..... (Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (sub-
559 contractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of ..... (project), for the weekly pay roll period from the ..... day of ....., 193 , to the ..... day of ..... , 193 ; that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of ....., 193 .

Section 3. Said affidavit shall be executed and sworn to by the officer of employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the some promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be

filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

560 Section 6. These regulations shall become effective on January 15, 1935.

The clause in the pay-roll affidavit which reads "* * * that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * * that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called Kickback Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unem-

ployment, or other similar benefits voluntarily authorized by permanent employees of equipment suppliers engaged in installation of the equipment at the site of the project.

*Penalty*

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both".

561 Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

562 *Memorandum.*

MARCH 31, 1936.

Plaintiffs' motion to consolidate causes 58927, 59071 and 59671, in Equity, for trial, filed.

*Order Consolidating Causes.*

Filed March 3, 1936

No. 58927 IN EQUITY

TEXAS UTILITIES COMPANY,

v.

HAROLD L. ICKES, Administrator, etc., et al.

Nos. 59071 and 59671 IN EQUITY

ALABAMA POWER COMPANY,

v.

HAROLD L. ICKES, Administrator, etc., et al.

Upon consideration of the motion of the plaintiffs filed in the above-entitled causes, it is by the Court this 31st day of March, 1936,

ADJUDGED, ORDERED and DECREED, That said causes be and the same are hereby consolidated for trial.

PEYTON GORDON,
*Justice.*

No objection.

ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*

563 *Opinion of Chief Justice Wheat.*

Filed June 5, 1936

* * * * * * * *

The plaintiffs in these five suits are public utility corporations owning or operating electric plants in their respective communities, and at the present time they have the field exclusively to themselves. The defendant, Ickes, is the Administrator of the Federal Administration of Public Works, and the other defendants are officers of the United States.

The object of the suits is to enjoin the defendants from furnishing money to the respective communities for the purpose of enabling them to construct municipal electric plants which, if constructed, will come into direct competition with those of the plaintiffs. In some cases, the

plaintiffs are operating under franchises which have some years to run. In some cases the franchises have expired and the companies are operating by consent or acquiescence of the local authorities. No serious claim is made
564 that there is any difference in the status of these companies so far as their right to sue is concerned. In no case does the plaintiff have an exclusive franchise. In each case it is subject to regulation by the appropriate local authority. In each case the plaintiff has a substantial investment in its plant and is furnishing satisfactory service and if subject to the competition which will result from a municipally-owned plant it will, beyond question, suffer serious damage and in some cases its business will be destroyed. It was frankly conceded by counsel for the plaintiffs that the municipalities have the legal power and right, if they proceed lawfully, to build competing municipal plants and that prior to the enactment of the statutes involved they had a desire to build such plants.

While the cases involve some differences of detail, both sides seem to agree that but three questions are involved in each. These questions are:

*First:* Have the plaintiffs a right to sue?

*Second:* Are the statutes involved constitutional?

*Third:* If constitutional, are the acts contemplated by the defendants authorized by the statute?

---

(1) Have the plaintiffs a right to sue?

It is urged that plaintiffs have no standing to bring these actions as no legal or equitable right of theirs will be infringed by the making of the loans; that the injuries which they will suffer will result, not from the making of the loans, but from the competition which will come when the municipal plants begin to operate, and inasmuch as the plaintiffs have no exclusive franchises, and as the
565 municipalities may lawfully build competing plants, the plaintiffs are in no position to complain because they are acquiring the funds wherewith to finance them in an unlawful manner. Such was the view taken by the United States Circuit Court of Appeals for the Fourth Circuit in *Greenwood County* v. *Duke Power Company*, 81 Fed.

(2nd) 986, and there is much authority to support it. It seems to me, however, that such a position is rather too narrow; that the furnishing of the funds by the Government and the resulting competition are so closely connected that, if the statute under which the funds are supplied is unconstitutional, or if the officer furnishing the funds is not authorized to do so, then the plaintiffs may test those questions on the merits.

There is a difference sometimes overlooked between the right to be heard and the right after hearing to prevail. My conclusion is that the plaintiffs have a standing as litigants which requires the Court to hear their claims and decide them on the merits. This seems to me to be consistent with what was held in *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 515.

(2) Are the statutes involved constitutional?

There are two statutes to be considered: The National Industrial Recovery Act, of June 16, 1933 (Title II, 48 Stat. 200), and the Emergency Relief Appropriation Act of April 8, 1935 (H. J. Res. 117).

The National Industrial Recovery Act contains the following provisions:

Section 202 provides (48 Stat. 201):

"The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conser-
566 vation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control * * *; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character here-

tofore eligibile for loans under sub-section (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; * * *."

Section 203 provides:

"(a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to states, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase * * *; Provided, that in deciding to extend any aid or grant hereunder to any state, county, or municipality the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several states, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands."

The Emergency Relief Appropriation Act of 1935 provides:

"That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated"

to be available for the following classes of projects:

"(a) Highways, roads, streets, and grade-crossing
567 elimination, $800,000,000; (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation, $500,000,000; (c) rural electrification, $100,000,000; (d) housing, $450,000,000; (e) assistance for educational, professional and clerical persons, $300,000,000; (f) Civilian Conservation Corps, $600,000,000; (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000; (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000; *Provided further,* That not to exceed 20 per centum of the amount herein appropriated may be used by the President to increase any one or more of the foregoing limitations if he finds it necessary to do so in order to effectuate the purpose of this joint resolution:" (49 Stat. 115, 6 unbound).

The contracts involved in these cases were made in December, 1935, from funds allotted under the Act of 1933, which had then expired, except as it had been continued by the Act of 1935. Section 12 of the latter Act provided:

"SEC. 12. The Federal Emergency Administration of Public Works established under title II of the National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purpose of said Act shall be available until June 30, 1937. The President is authorized to sell any securities acquired under said Act or under this joint resolution and all moneys realized from such sales shall be available to the President, in addition to the sums heretofore appropriated under this joint resolution,

for the making of further loans under said Act or under this joint resolution." (49 Stat. 119, unbound).

One of counsel for the plaintiffs, in his closing argument, said:

"There are two ways of construing this later act. You can say that after NIRA expires, all action is taken under a later act; or you can say that action is taken on the earlier act as extended by the President. It does not make the slightest difference at all, because, in either case, it rested entirely in the hands of the President as to what he should continue from NIRA, and what he should not continue." (Transcript of Proceedings, Vol. 14, pp. 1777, 1778).

While both Acts have been referred to in the argu-
568 ments, the provisions of the Act of 1933 seem to me to be the ones with which we are principally concerned, although I do not think the question is of much importance.

If the projects herein involved be deemed authorized by the Act of 1933, the authority must be found under Section 202 as part of the Public Works Program described in subdivision (a):

"(a) Construction * * * of publicly owned instrumentalities and facilities"

for which under Section 203

"With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered * * * (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to states, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; * * *."

Under the Act of 1935, we have an appropriation available for

"(g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and

self-lquidating projects of public bodies thereof, where in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000; * * *".

The constitutionality of the provisions of the Act of 1933 was sustained by the United States Circuit Court of Appeals for the Fourth Circuit in the case of *Greenwood County* v. *Duke Power Company,* decided February 22, 1936, supra, which was a suit brought by the Duke Power Company to enjoin the South Carolina County of Greenwood from constructing an electric power plant on the Saluda River and from obtaining a loan and grant from the Federal Public Works Administration for the purpose of constructing it.

The Act was also sustained by the Circuit Court
569 of Appeals for the Tenth Circuit in *Kansas Gas & Electric Co.* v. *City of Independence* (79 Fed. (2nd) 32, 44). See also *Langer et al.* v. *United States,* (76 Fed. (2nd) 817).

The provisions of the Emergency Relief Appropriation Act of 1935, in so far as they provide for "housing" projects were held unconstitutional by our Court of Appeals in *The Township of Franklin* v. *Tugwell,* decided May 18, 1936, on the ground that they violated Section 1 of Article 1 of the Constitution as a delegation of legislative power to the President. If it could fairly be said that that case had gone so far as to hold all the provisions of the Act to be unconstitutional, I would, of course, feel bound by it, but the only class of projects considered was "housing", and counsel for the plaintiffs do not claim that it goes further. In his opinion, Mr. Justice Van Orsdel said:

"In what we have said we do not lose sight of our duty to construe the Act so as to avoid, if fairly possible, the conclusion that it is unconstitutional. In an effort to carry out this judicial obligation, we have endeavored to find in the Act language which would enable us to say that Congress had declared a legislative policy with relation to 'housing' with sufficient definiteness to avoid the charge of an unconstitutional delegation of legislative power. But, as we have pointed out, this is not to be found. We are not

here confronted with an appropriation for internal improvements of a national character or importance, or for the erection of public buildings, or the grant of loans to a state or municipality to carry out public works projects. As to these we might find in the nature of the objective a well-beaten path by which to supply the omitted means to that end. But here we have neither path nor program."

We have in the present cases grants or loans to municipalities to carry out public works projects, as to which it is easy to find the "well-beaten path".

It has not been argued that the relief of unemployment is an unconstitutional use of funds of the United States. The constitutionality of the statutes was attached on two grounds:

*First:* That there was an invasion of the reserved
570 powers of the States in violation of the 10th Amendment, and

*Second:* That there was a delegation of legislative power to the President in violation of Section 1 of Article I of the Constitution.

Both these grounds were considered in *Greenwood County v. Duke Power Company*, supra, and held to be without merit. After pointing out that the statute contemplated not the construction of isolated projects but of a "vast program of public works" intended to relieve unemployment and that such expenditures are justifiable and for the general welfare, the Court said at p. 994:

"And we do not think that it can be said that Congress is invading the reserved powers of the states, or is making expenditures for matters essentially local in character, merely because the project for which expenditure is made is not connected with interstate commerce and, when considered alone, is local in character. It cannot be said to invade the reserved powers of a state to make loans or grants of money to municipal corporations which the state continues to control, and which are at liberty to reject the loans and grants if they see fit to do so. And a program of works for relieving nationwide unemployment does not lose it national character and become local merely because each of the public works projects is constructed in some particular locality."

That the program is nationwide appears from the testimony of Administrator Ickes, who said that it extended to every county of the United States, except 3, and that there were 260 electric power projects though but 85 of them were in places where there were privately-owned facilities. In the present cases, the Federal Government retains no regulatory power over the operation of the projects for which it makes loans. I am unable to see how any reserved power of a State is infringed.

On the question of an unconstitutional delegation of legislative power, the Court said, p. 994:

571 "Nor do we think that the pertinent portion of the Act can be condemned as an unconstitutional delegation of legislative power within the rule laid down in *Panama Refining Co. v. Ryan* 293 U. S. 388; and *L. A. Schechter Poultry Corporation v. United States* 295 U. S. 495. It was out of the question for Congress to prescribe the details of an extended program of public works. It appropriated the money for the purpose, laid down the principles which were to guide the President and the Administrator of Public Works in its expenditure, and left to them the working out of the details. The making of loans and grants in carrying out the policy thus laid down by Congress is the exercise of administrative, not legislative, discretion. As said in *Wilmington & Zanesville Railroad Co. v. Commissioner,* 1 Ohio St. 77, 88, and quoted with approval by the Supreme Court in *Hampton & Co. v. United States,* 276 U. S. 394, 407: 'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' "

The Court also points out that the question was fully considered by the Circuit Court of Appeals of the Tenth Circuit in *Kansas Gas & Electric Co. v. City of Independence,* supra, and expresses itself as in accord with what was said by Judge Phillips in that case.

I think the reasoning of the Court in these cases is sound. The statutory provisions are in my opinion valid.

(3) Are the acts contemplated by the defendants authorized by the statute?

The action contemplated by the defendants is attacked as being beyond the authority conferred by the statute on various grounds, which seem to me to be without merit. Some of them were considered at length in *Greenwood County v. Duke Power Co.*, supra.

One ground of attack is that the Administrator did not at the start prepare "a comprehensive program". It is undoubtedly true that in a literal sense no definite program was at first formulated. The program was worked out slowly and progressively and considerable time was occupied in effecting an organization and in the examination of many proposed projects. The defendant, Ickes,
572 in response to a question asking his administrative interpretation of the provisions of the statute relating to a comprehensive program of public works, answered:

"We had two duties to perform, as I saw it. One was to prepare a comprehensive program of public works. The other was to get men in as large numbers as possible to work as quickly as possible. In any conflict between the two, we felt that the latter took precedence.

"We soon realized that to prepare a comprehensive program of public works would require months—perhaps a year or two—and that if we literally set about the preparation of a comprehensive program of public works, the very purpose of the Act itself would be defeated. So, we satisfied ourselves by developing the program of desirable public works as we progressed. We did not treat it academically at all, but practically." (Transcript of Proceedings, Vol. 12, p. 1468).

This I think was a reasonable, practical and substantial compliance with the statute. It appears from the evidence that on March 20, 1934, pursuant to a Resolution (Sen. Res. 190, 73rd Cong.) calling upon the Administrator to furnish the Senate with information, including a general survey of the public works program and an account of the organization of the Public Works Administration and a statement of its policies, the Administrator submitted a report to Congress a document of some 300 pages in length, giving the information called for by the Resolution. Thereafter

Congress passed the Emergency Relief Act of 1935, with full information in regard to what had been done and what was being done under the Act of 1933. It seems to me that this must be regarded as Congressional approval of the Administrator's program.

It has been argued that some of the projects are not useful or are not self-liquidating, or are not primarily for the relief of unemployment. I feel, however, that the determination of such matters is within the discretion of the President, or the Administrator acting under him. Beyond all question, the Act confers upon these Executive
573 Officers a very wide discretion, and I believe that their decisions upon such matters of detail are not subject to judicial review.

My conclusion upon the whole case is that the bills should be dismissed upon the merits.

ALFRED A. WHEAT
*Chief Justice*

June 5, 1936

574 *Defendants' Proposed Findings of Fact and Conclusions of Law*

Filed June 26, 1936

* * * * * * * * *

In the above-entitled cause heard before the undersigned, the Chief Justice of this Court, sitting in Equity Division No. 3, the Court, from the pleadings and exhibits filed and from the hearings had and the evidence taken before it, makes the following findings of fact and reaches the following conclusions of law:

575 *Findings of Fact*

*Description of Parties.*

1.

The plaintiff Oklahoma Utilities Company is a corporation organized and existing under the laws of the State of Oklahoma, with one of its places of business in the City of Hominy, Osage County, Oklahoma. It is engaged in the

business, among other things, of purchasing, transmitting, selling and distributing electricity in several communities in the State of Oklahoma and, in particular, has been and now is engaged in such business in the City of Hominy, State of Oklahoma. This plaintiff is the only agency existing in the City of Hominy for the distribution of sale therein of electricity.

2.

The plaintiff Texas Utilities Company is a corporation organized and existing under the laws of the State of Texas, and has its principal office in the City of Plainview, Hale County, Texas. This plaintiff is engaged in the business of generating and distributing electricity in the State of Texas. It is the only agency now existing for the sale and distribution of electrical energy in the said City.

3.

The plaintiff Alabama Power Company is a corporation organized and existing under the laws of the State of Alabama, and has its principal office in the City of Attalla, Alabama. The Alabama Power Company owns and operates a generating, transmission and distribution system in the State of Alabama and distributes electrical energy to numerous communities in that State, including the cities of Florence, Decatur, Sheffield, Tuscumbia, Hartselle, Russellville, and Guntersville. This plaintiff is the only agency now engaged in supplying electric light and power to the said cities, except for the City of Sheffield, which is now engaged in the distribution and sale of electrical
576 energy on a limited scale.

The Alabama Power Company owns and operates hydro-electric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, the construction of which was permitted by an Act of Congress approved March 4, 1907 (34 Stat. 1288); Mitchell Dam and Jordan Dam, likewise on the Coosa River, Alabama; and Martin Dam on the Tallapoosa River, Alabama, which latter three dams were constructed under licenses granted by the Federal Power Commission.

4.

The plaintiff Iowa City Light & Power Company is a corporation organized and existing under the laws of the State of Delaware, is qualified to do business in the State of Iowa as a foreign corporation, and has its principal office in said State, in the City of Iowa City, Iowa. This plaintiff is engaged in the generation of gas and electrical energy and in the transmission, distribution and sale thereof in the City of Iowa City, and in the incorporated towns of Coralville and University Heights, Johnson County, Iowa. This plaintiff is the only agency now selling and distributing electrical energy in the said towns.

5.

The defendant Harold L. Ickes (hereinafter sometimes called the "Administrator") is the duly qualified and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called "PWA") appointed by Executive Order of the President of the United States of America, dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title 55 of "The National Industrial Recovery Act," approved June 16, 1933.

6.

The defendant Horatio B. Hackett is the duly appointed, qualified and acting Assistant Administrator of PWA.

577

7.

The defendant John J. Madigan is a duly appointed, qualified and acting Executive Officer of PWA.

8.

The defendant F. E. Schnepfe is the duly appointed, qualified and acting Director of the Projects Division of PWA.

9.

The defendant Harry L. Hopkins is the duly appointed, qualified and acting Administrator of the Works Progress Administration, and was appointed such by an Executive

Order of the President of the United States (No. 7034), dated May 18, 1935.

10.

The defendant Henry Morgenthau, Jr. is the duly appointed, qualified and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of public funds of the United States.

11.

The defendant W. A. Julian is the duly appointed, qualified and acting Treasurer of the United States and, as such, is in control of the payment of checks drawn upon him by disbursing officers of the United States.

12.

The defendant Guy F. Allen is the duly appointed, qualified and acting Chief Disbursing Officer, Division of Disbursement, Treasury Department of the United States and, as such officer, is in control of drawing and issuing checks on behalf of the United States, and the disbursement of the public funds of the United States.

*The Franchises of the Plaintiffs*

13.

The ultimate predecessor of the plaintiff Oklahoma Utilities Company was granted a non-exclusive franchise by the City of Hominy on March 12, 1914, to engage in
578 the electrical business in the said City for twenty years. The franchise was assigned to this plaintiff's immediate predecessor on May 1, 1926. The franchise expired on March 12, 1934, and has not been renewed or extended. This immediate predecessor, a corporation, was reorganized on October 1, 1934, and the reorganized corporation is the plaintiff Oklahoma Utilities Company, which is now operating in the City of Hominy at sufferance.

14.

On or about the 15th day of April, 1909, the City Council of the City of Plainview, Texas, granted to the predecessor

of the plaintiff Texas Utilities Company, a non-exclusive franchise to construct, operate and maintain an electric light and power plant and distribution system in the City of Plainview, Texas, for a period of fifty years. This franchise was assigned to the Texas Utilities Company on November 17, 1915.

15.

In the year 1902 the Cities of Florence, Sheffield and Tuscumbia, each granted to the predecessor in interest of the plaintiff Alabama Power Company a non-exclusive franchise to construct and operate an electric power plant. These franchises were assigned to the plaintiff Alabama Power Company in 1925. By their terms, the franchises so granted by the Cities of Sheffield and Tuscumbia expired in October, 1932, and the franchise granted by the City of Florence expired in March, 1933.

On October 16, 1919, the City of Decatur granted to the plaintiff a similar non-exclusive franchise which on January 27, 1920, became effective for a period of thirty years.

On August 10, 1915, the Town of Hartselle granted to the plaintiff Alabama Power Company an intermediate non-exclusive franchise to construct, maintain and operate throughout said town an electric distribution system and business.

On July 5, 1915, the Town of Guntersville granted a similar non-exclusive franchise to the plaintiff Alabama Power Company.

On June 28, 1923, the Town of Russellville granted
579 a similar non-exclusive franchise to the plaintiff Alamaba Power Company.

16.

In the year 1909 Iowa City, Iowa, granted to the predecessor in interest of the plaintiff Iowa City Light and Power Company a non-exclusive electric franchise for a period of twenty years. In the year 1912 this franchise was assigned to the Iowa City Light and Power Company. In the year 1932 this plaintiff made an application to the City for a renewal of its franchise. An election was held in Iowa City on October 11, 1932, at which time the ques-

tion as to whether the franchise should be renewed was submitted to a popular vote. A majority of those voting voted against such renewal. The franchise thereafter expired in accordance with its terms on January 11, 1934 (Martin, 1226).

In the year 1934 the Town of Coralville, Iowa, granted to this plaintiff a non-exclusive franchise extending for the term of twenty-five years, and in the year 1935, the Town of University Heights, Iowa, granted to this plaintiff a non-exclusive franchise for a term of fifteen years.

*Plaintiffs as Taxpayers*

17.

Each of the plaintiffs annually pays substantial amounts of money in taxes to the United States, and to the States and municipalities in which they operate.

The plaintiff Alabama Power Company paid annual license and privilege taxes on the operation of its business to the Cities of Florence, Sheffield and Tuscumbia, Alabama, up to January 1, 1936. In January, 1936, the Cities of Florence and Sheffield refused to accept any privilege and license tax for the year 1936 from the Alabama Power Company.

18.

580 *Authority of Cities to Build Plants*

19.

The Cities of Florence, Decatur, Sheffield, Tuscumbia, Hartselle, Russellville, Guntersville, in the State of Alabama, the City of Hominy, Oklahoma, the City of Plainview, Texas, are authorized by the laws of their respective States to construct and operate municipal electric plants and distribution systems. In the Cities of Plainview, Texas, and Decatur, Hartselle, Russellville and Guntersville, Alabama, the municipalities are authorized to engage in competition with the existing power company, and in the Cities of Hominy, Oklahoma, Iowa City, Iowa, and Florence, Sheffield and Tuscumbia, Alabama, where the franchises of the existing power company have expired, the Cities may either compete with or supplant the existing plants of the power company.

Each of the Cities involved in these suits is authorized to issue bonds for the purpose of financing the construction of their respective plants and to receive grants for that purpose.

*Events Leading to Applications of Cities*

20.

*Florence.*

In March, 1933, the City of Florence employed engineers to appraise the existing system belonging to the Alabama Power Company which was supplying it with electrical power (149). During 1933, an election was held to determine whether the City should engage in the municipal electric business. The proposition carried by a vote of 14½ to 1. On or about November 16, 1933, the City of Florence and the Alabama Power Company entered into negotiations for the purchase by the City of the plant of the Company at Florence. These negotiations were terminated because of the wide divergence between the price offered by the City and the amount asked by the Power Company for its plant (151).

On December 20, 1933, the City of Florence filed an application with the Public Works Administration for a loan and grant, under Title II of the National Industrial
581 Recovery Act, for the purpose of constructing a municipal power plant, and sometime later an allotment for a loan and grant to the City was made by the Public Works Administration and approved by the President.

Subsequently to these proceedings, the Tennessee Valley Authority attempted to persuade the City of Florence to enter into a plan whereby the Authority would exercise its option (later abandoned) to purchase distribution systems in Florence, Alabama, and several other communities, from the Alabama Power Company, rehabilitate them, and turn them over to the communities. This plan was inaugurated in an attempt by the Tennessee Valley Authority to prevent duplication of existing facilities of the power company and for the purposes of protecting the investment of the Alabama Power Company. The City of Florence rejected this proposal as disadvantageous to itself, and made a counterproposal that it purchase the existing facilities of the Ala-

bama Power Company at Florence, and use funds to be supplied by the Public Works Administration for rehabilitation and extensions. Later this plan was abandoned by the Tennessee Valley Authority. PWA refused to make a loan or grant to the City of Florence until this plan had been abandoned.

21.

On December 28, 1934, the Public Works Administration entered into a loan and grant agreement with the City of Florence, whereby the United States agreed to aid the City in financing the construction of a municipal electric distribution system. A copy of this agreement appears as Exhibit F-1; Part 2-a, of Stipulation Agreement No. 1 in the cases of Alabama Power Company v. Ickes, et al., Equity Nos. 59071 and 59671.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into between the City of Florence and the Public Works Administration. A copy of this new agreement appears as Exhibit F-3 in the said Stipulation Agreement No. 1.

582 22.

*Sheffield.*

In June, 1933, the City of Sheffield, Alabama, held an election to determine whether the City should erect a municipal power plant (Greer-210). The result of this election was 630 in favor of the establishment of a municipal electric system, and 96 against such a system.

Thereafter, on December 20, 1933, the City of Sheffield, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant. In December, 1934, a loan and grant agreement was entered into between this City and the Public Works Administration. A copy of this agreement appears as Exhibit S-1; Part 1-a, of the aforementioned Stipulation Agreement No. 1.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into between

the City of Sheffield, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit S-3 of the said Stipulation Agreement No. 1.

23.

*Tuscumbia.*

On August 30, 1933, the City of Tuscumbia, Alabama, held an election to determine whether the City should erect a municipal power plant (Parr-205). The result of this election was 336 in favor of the establishment of a municipal electric system, and 8 against such a system.

Thereafter, on December 20, 1933, the City of Tuscumbia, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant. In December, 1934, a loan and grant agreement was entered into between this City and PWA. A copy of this agreement appears as Exhibit T-1; Part 1-a, of the aforementioned Stipulation Agreement No. 1.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into be-
583 tween the City of Tuscumbia, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit T-3 of the said Stipulation Agreement No. 1.

24.

*Decatur.*

On October 1, 1933, the City of Decatur, Alabama, held an election to determine whether the City should erect a municipal power plant (Hendrix-215). The result of this election was 1415 in favor of the establishment of a municipal electric system, and 501 against such a system.

Thereafter, on December 20, 1933, the City of Decatur, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant. In December, 1934, a loan and grant agreement was entered into between this City and the Public Works Administration. A copy of this agreement appears as Exhibit D-1; Part 3-b, of the aforementioned Stipulation Agreement No. 1.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into between the City of Decatur, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit D-3 of the said Stipulation Agreement No. 1.

25.

*Hartselle.*

Sometime in 1933, the City of Hartselle, Alabama, held an election to determine whether the City should erect a municipal power plant (Livingstone-176). The result of this election was 296 in favor of the establishment of a municipal electric system, and 18 against such a system.

Thereafter, on December 20, 1933, the City of Hartselle, Alabama, filed an application with the Public Works Administration for a loan and a grant of funds for the erection of a municipal power plant, and a loan and grant
584 agreement, dated December 4, 1935, was entered into between the City of Hartselle, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit H-1, Part 2-a, of the aforementioned Stipulation Agreement No. 1.

26.

*Russellville.*

In December, 1933, the City of Russellville, Alabama, held an election to determine whether the City should erect a municipal power plant (Porter-182). The result of this election was 405 in favor of the establishment of a municipal electric system, and 103 against such a system.

Thereafter, on December 20, 1933, the City of Russellville, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant, and a loan and grant agreement, dated December 4, 1935, was entered into between the City of Russellville, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit R-1; Part 1-a, of the aforementioned Stipulation Agreement No. 1.

27.

*Guntersville.*

On September 4, 1933, the City of Guntersville, Alabama, held an election to determine whether the City should erect a municipal power plant (Scruggs-200). The result of this election was 240 in favor of the establishment of a municipal electric system, and 70 against such a system.

Thereafter, on December 20, 1933, the City of Guntersville, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant and a loan and grant agreement, dated December 4, 1935, was entered into between the City of Guntersville, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit G-1; Part 2-a, of the aforementioned Stipulation Agreement No. 1.

585

28.

*Hominy.*

Sometime in the year 1930, the Mayor and City Council of the City of Hominy, Oklahoma, became interested in the construction of a municipal electric light plant (Hall-7), and on December 16, 1930, the City held an election to determine the question of the issuance of bonds to be used for the purpose of constructing a municipal plant and distribution system. The vote was 373 in favor of the issuance of the bonds and 42 against.

The validity of the proposed bond issue was contested in the courts of Oklahoma; a contract was let for the construction of the proposed municipal plant; the performance of this contract was enjoined by the Federal Court in a suit brought by the Oklahoma Utilities Company. The City then began negotiations for the sale of its bonds to the Reconstruction Finance Corporation.

On August 24, 1933, the City filed an application with PWA for a loan and grant to erect the proposed municipal power plant, and a loan and grant agreement dated January 10, 1935, was entered into between the PWA and the City of Hominy. A copy of this agreement is attached to plaintiff's Exhibit 92 and marked Exhibit C.

During the month of September, 1935, this contract was terminated and thereafter a new agreement, dated December 14, 1935, was entered into between the parties. A copy of this agreement is attached to plaintiff's Exhibit 92 and marked Exhibit F.

At the present time work is actually being carried on in the construction of the municipal power plant in Hominy without the use of Federal funds (Hall-14).

29.

*Plainview.*

On July 20, 1931, the Council of the City of Plainview, Texas, adopted a resolution favoring the erection of a municipal light and power plant. (Dysart-23). On November 15, 1932, the Council adopted an ordinance to the same effect and on the same date authorized the Mayor and the City Secretary to enter into a contract with Mont-
586 gomery & Ward, Engineers, of Wichita Falls, Texas, for the erection of a municipal light and power plant.

On April 4, 1933, a municipal election was held to determine whether the City Council should be authorized to issue revenue bonds for the purpose of erecting a municipal power plant (Dysart-25). The result of this election was 438 in favor of the issuance of such bonds, and 100 against such issurance.

On August 17, 1935, a loan and grant agreement was entered into between the City of Plainview and the Public Works Administration. A copy of this agreement is attached to plaintiff's Exhibit 24, marked Exhibit D. This contract was terminated by mutual agreement, dated December 2, 1935, and on December 4, 1935, a new loan and grant agreement was entered into between the City of Plainview and the Public Works Administration. A copy of this new agreement is attached to plaintiff's Exhibit 24, marked Exhibit F-1.

30.

*Iowa City.*

On April 19, 1934, an election was held in Iowa City, Iowa, on the question of the construction of a municipal electric system, and the issuance of revenue bonds there-

for. The result of this election was 2959 in favor of such construction and issuance and 2804 against such construction and issuance.

On January 8, 1934, Iowa City made application to PWA for a loan and grant for the construction of a municipal electric project. The project was approved by the Administration and the President and a loan and grant agreement was forwarded to the City. On October 5, 1934, the City returned the loan and grant agreement unexecuted and withdrew its application. On April 5, 1935, after a change in the City administration, the application was reinstated. On June 17, 1935, the application was amended so as to apply for a grant only. On January 8, 1936, pursuant to said application, PWA made an offer in writing to aid the City by way of grant in financing the construction of a municipal power plant; a copy of this offer is set forth in plaintiff's Exhibit 52. This offer was accepted by resolution of the City Council on March 6, 1936.

587 31.

*Procedure for Handling Applications*

*Organization of PWA.*

At the head of PWA is the Administrator, whose powers are plenary and subject only to the control of the President. He has complete supervision and direction of the Public Works Administration. The Public Works Administration is composed of a number of Divisions, among which are the Legal Division, the Engineering Division, the Financial Division, and the Projects Division. The first three of the foregoing are examining divisions, and their function is to examine and make recommendations to the Administrator with respect to applications for projects. The Projects Division coordinates the reports of the examining divisions, and records and routes applications.

In addition there existed at one time in the Public Works Administration a Technical Board of Review to consider projects against which an adverse report or protest had been lodged, and an Electric Power Board of Review established May 9, 1934, which considered adverse reports or protests with respect to electric power projects. The Elec-

tric Power Board of Review was dissolved by order of the Administrator on March 16, 1935.

The PWA has a field office in every State in the country. The chief official in each of these offices was at one time known as the State Engineer for the Public Works Administration, who usually was the Chairman of a State Advisory Board. This official is now designated as the State Director, and the State Advisory Board has been abolished.

By Executive Order of June 16, 1933, the President of the United States appointed a Special Board for Public Works, consisting of the Secretary of the Interior as Chairman, and certain other Government officials as members. One of the functions of this Board was to pass upon all recommendations for allotments of funds appropriated pursuant to Title II of the National Industrial Recovery Act, for loans and grants for public works projects.

*Applications.*

Applications for loans and grants for PWA projects are governed by two separate statutes,—Title II of the National Industrial Recovery Act, and the Emergency
588 Relief Appropriation Act of 1935, and the procedure for handling applications is slightly different under each statute.

Applications for funds appropriated by Title II of the National Industrial Recovery Act, such as are involved in the projects in the Cities of Florence, Sheffield, Tuscumbia, Decatur, Hominy and Plainview were received in the first instance at the State PWA office. Such applications were examined in such offices. The State Engineer made a report to the Public Works Administrator, recommending approval or disapproval of the application. The application and State Engineer's report were received by the Projects Division of the central office in triplicate, a copy of which was transmitted to each of the examining divisions for study and recommendation.

The recommendations of the three examining divisions were then sent to the Special Board for Public Works, which passed a resolution, recommending approval or disapproval of an allotment. If the Administrator of Public Works agreed with the recommendation for an allotment

for the project he signed the resolution in approval thereof. An allotment of funds was not intended to create, and did not create, a legal obligation to make a loan or grant. The Administrator then presented a list of projects to the President with his recommendation. The President gave a final approval or disapproval to the application by making notations on and signing the list.

Applications for funds appropriated by the Emergency Relief Appropriation Act of 1935, such as are involved in projects for the Cities of Hartselle, Russellville, Guntersville and Iowa City are handled in a slightly different manner. The applications are received in the first instance by the State Director of PWA. At the State office, representatives of the Legal, Engineering and Financial Divisions examine the application and prepare reports. The applications and the reports are forwarded in triplicate to the central office in Washington, and are there reviewed by the three examining divisions, and approval or disap-
589 proval is recommended by the Director of each examining division. If the application is approved by the Administrator and by the President of the United States the allotment is complete.

Before approving any project and before executing or authorizing the execution of a loan and grant agreement under either statute the Administrator received advice from his subordinates with respect to the facts bearing upon whether the making of the loan and grant would comply with the pertinent provisions of the statutes and Executive Orders of the President. In some instances he also relied upon data received through oral conferences, the results of which were not always reduced to writing. The Administrator submitted the approved projects to the President for his consideration and approval; in some instances the President acted on the basis of oral discussions which were not reduced to writing.

32.

Loans and grants for the financing of municipal electric projects were dealt with in the same manner and judged by the same tests as other projects.

Each of the applications submitted by the Cities herein involved were handled in accordance with the procedure outlined in Finding 31.

33.

*Functions of PWA Subordinates Advisory*

The State Engineers or Directors, the State Advisory Boards, each of the examining divisions of the PWA, the Projects Division, the Special Board for Public Works, the Technical Board of Review, and the Electric Power Board of Review, have at all times had only advisory powers with respect to the approval of applications for loans and grants. None of these agencies had any power either by original authorization or subsequent ratification to make allotments or contracts or to make commitments with respect thereto, or to do anything whatsoever except to obtain information and to make advisory reports and recommendations to the Administrator. The power of approval or disapproval rested entirely with the Administrator and the President.

590

34.

*Cities Propose to Build Plants*

With the proceeds of the sale of its bonds, and of the grant by PWA, each of the cities herein involved proposes to construct a municipal electric light plant. The result will be competition with the plants of the Plaintiffs which in all probability will thereby suffer substantial financial loss.

35.

*Inducement.*

The determination of whether municipal competition with privately-owned utilities, or the elimination of competition by privately-owned utilities where their franchises had expired, was desirable, was made by the cities involved and not by PWA.

Each of the municipalities involved in this suit determined to enter into the electric distribution business of its own free will. There was no solicitation or coercion on the

part of any of the defendants, their agents or subordinates. There was and is no conspiracy between any of the defendants and any other person, nor is there any other effort on the part of any of the defendants to, nor are their actions motivated by a desire to, cause injury or financial loss to the plaintiffs, or to regulate their rates or electric rates generally, or to foster municipal ownership of utilities.

The expenditures under these statutes involve no purchase of, nor contract providing for, regulation by the United States. The failure of any city to apply for or receive loans or grants under those statutes will impose upon it no disadvantage or financial loss.

36.

*Rates.*

The defendants have not reserved any right or power to influence or control rates to be charged by the proposed municipal power plants. Provisions of earlier contracts in any way inconsistent with the facts found herein were eliminated before any action was taken pursuant thereto by any of the municipalities.

591

37.

Neither the United States nor any of the defendants has reserved any right or power under the existing contracts, or in any other way, to require any of the municipalities to eliminate competition or to designate the person or agency from whom the municipality must purchase its power. Provisions of earlier contracts in any way inconsistent with the facts found herein were eliminated before any action was taken pursuant thereto by any of the municipalities.

The rights of the United States with respect to the construction of the projects are fully set forth in the contracts. These contracts are subject to no terms or conditions except as specifically set forth therein.

38.

Neither the United States nor any of the defendants has any power to control the operation of the projects after construction is completed.

39.

*Comprehensive Program*

Upon his determination to approve a project, include it in the comprehensive program of public works, and make a loan and grant therefor, the Administrator submitted it to the President for his approval. When the action of the Administrator was approved by the President, funds were allocated for the specific project. On March 20, 1934, pursuant to a Resolution (Sen. Res. 190, 73rd Cong.) calling upon the Administrator to furnish the Senate with information including "a general survey of the public works program," an account of the organization of the Public Works Administration and a statement of its policies, the Administrator submitted a report to Congress, a document some three hundred pages in length, giving the information called for by the Resolution, including a detailed list containing the name, location, and type of each approved project and the amount of funds allocated therefor.

Thereafter, on June 19, 1934, Congress enacted the Emergency Appropriation Act, Fiscal Year of 1935 (Pub.
592 No. 412, 73rd, Cong., 2d Sess.), which, among other things authorized not exceeding $500,000,000 for public works under Title II of the National Industrial Recovery Act. On April 8, 1935, Congress enacted the Emergency Relief Appropriation Act of 1935, which, among other things, authorized the continuance of the Public Works Administration and the performance of its functions, and made available additional sums for loans and grants to States, municipalities, and other public bodies.

40.

*Public Works Administration Program National in Scope.*

A total of 7,957 projects, of many different types and extending into every county in the United States except three, have been approved by the Public Works Administration and funds allocated therefor. Of this number, 260 are electric power projects, 85 being located in places where privately-owned electric facilities are now being operated. The amount allotted for all non-Federal PWA projects is $1,222,636,961. The total allotted for the 85 competing

electric projects is $58,768,800, representing 1.1% of the total number of allotments and 4.8% of the total amount of allotments.

41.

*General Welfare.*

Each of the projects herein involved is a part of a program of national scope, is designed to relieve unemployment, and promotes the general welfare of the United States.

42.

*Loans Reasonably Secured.*

No attempt was made by the plaintiffs in any case except with respect to Plainview, Texas, to prove that the loans were not reasonably secured and that the projects were not self-liquidating. In the case of Plainview, Texas, there is substantial evidence to support the determination of the Administrator that the Plainview project is self-
593 liquidating and that the loan is reasonably secured.

As to all other projects involved in this litigation, except that in Iowa City which involved a grant only, the Administrator has made a determination that the loans are reasonably secured.

43.

*Projects Approved.*

Each of the projects herein involved has been approved by the Administrator and by the President of the United States.

44.

*Work on Projects*

The President of the United States has determined that in the case of the projects to be constructed in the Cities of Iowa City, Iowa, and Hartselle, Russellville, and Guntersville, Alabama, with funds appropriated under the Emergency Relief Appropriation Act of 1935, 25% of the loan or grant, or the aggregate thereof, will be expended for work on each project.

45.

The Court judicially notices that the census of 1930 indicates that in the years 1923-1925 there were approximately forty-one million people over the age of ten years gainfully employed in the United States. This number included agricultural and industrial workers. Of this group eight million were employed in industry. These are subdivided into workers in the durable and non-durable industries. The durable goods industries include firms manufacturing such products as iron and steel, machinery, transportation equipment, railroad repair shops, non-ferrous metals, lumber and allied products, stone, clay and glass products. In the non-durable goods groups are textiles and their products, such as clothing, leather and its products, such as boots and shoes, food and kindred products, tobacco manufacturers, paper, printing, chemicals, and rubber products.

During the period 1923-1925 the average number of persons employed in the durable goods group and the
594 non-durable group was approximately equal, there being over four million persons in each group.

From data computed by the Bureau of Labor Statistics of the Department of Labor, it appears that if the average monthly number of persons employed during the years 1923-1925 be taken as normal and indicated by the index number 100, then both the durable goods and the non-durable goods industries stood together in August of 1929 at the figure 107. From the year 1923 to the year 1929 there was very small variation in the movement of employment in the durable and non-durable goods groups. Beginning with the latter part of 1929 employment in both groups decreased, but in the durable goods industries it decreased more rapidly than in the consumers' or non-durable goods industries.

During the first six months of the year 1933, the index of employment in the durable group varied between approximately 45 and 50, while during the same period the index of employment in the non-durable group varied between approximately 75 and 85.

46.

Pursuant to the provisions of PWA Contracts, contractors engaged in furnishing materials and labor on public works projects are required to furnish reports to the Bureau of Labor Statistics giving data in regard to the number of people on the payroll, the amount of the payroll, the man hours of work at the site of the construction project and the expenditures for construction materials. Upon the basis of information so received, a study was undertaken by the Bureau of Labor Statistics of six power projects already completed with funds furnished by the Public Works Administration. The total expenditure for labor and materials amounted to $461,628. The study shows that this amount of labor at the site accounted for 13.2% of the total expenditure, and materials for 86.7%. There were 85,529 man-hours created by these projects and 380,000 man-hours of indirect labor in fabricating, transporting, and producing the materials. Four and four-595 tenths man-hours of indirect labor were created for each man-hour of labor at the site. The conclusions of the Bureau of Labor Statistics as to indirect labor are approximations based upon carefully worked-out averages, and do not purport to be precise.

From July, 1933, until March, 1936, a total of $1,177,000,000 was advanced by the Public Works Administration for the purchase of materials for public works projects.

47.

The fundamental purpose of PWA was and is to relieve existing widespread unemployment, and to increase purchasing power through the construction of useful public works.

48.

Public Works projects are particularly adapted to relieving unemployment in the durable goods industries, by providing both direct employment, which is work at the site of the project, and indirect employment, which is work in industries supplying materials for use at the site, mining industries, and transportation facilities.

49.

50.

The discretionary powers authorized by Section 203 (d) of Title II of the National Industrial Recovery Act have never been exercised.

596 *Conclusions of Law*

1.

The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935 and the contracts and the loans and grants involved in these units are valid and constitutional.

2.

The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the contracts and the loans and grants involved in these suits involve valid expenditures for the general welfare, and involve no improper delegation of legislative power and no exercise of any improperly delegated power, and do not violate the Tenth Amendment or any other provisions of the Constitution.

3.

4.

Title II of the National Industrial Recovery Act sets forth definite standards with respect to the purposes of the expenditures by the Administrator and the means by which such expenditures should be made. These standards, as administratively interpreted, were reaffirmed by the Emergency Relief Act, Fiscal year of 1935, approved June 19, 1934, and were also reaffirmed by and incorporated in Section 12 of the Emergency Relief Appropriation Act of 1935, approved April 8, 1935.

5.

If the making of the loans and grants results in lower rates, such result is but the incidental effect of what the

States and their municipalities voluntarily decide to do, and therefore cannot have the effect of making such loans and grants invalid.

6.

Under the contracts involved in these cases the United States will have no control of the rates charged by, or the operation and management of, the plants of the several cities, and no rights with respect thereto other than
597 those which any other holder of the bonds of any such cities would have under the laws of the States in which the cities are situated. The rates charged by the several cities, and the operation and management of their plants will in all respects continue to be subject to regulation by the several States in which the several cities are situated. The United States is in no way attempting to and will in no way be able to regulate commerce within any of the States, as a result of said contracts.

7.

The contracts and the proposed loans and grants involved in these suits are made and being made in full compliance with the applicable statutes.

8.

Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935 authorize the making of loans and grants by PWA to municipalities for the purpose of financing the construction of municipally-owned generating plants and distribution systems, regardless of whether or not they compete with plants or distribution systems owned by privately-owned public utility companies, or will supplant the same where the franchises of such companies have expired.

9.

The provision of the Emergency Relief Appropriation Act of 1935 requiring that the President determine that, in the case of loans or grants to cities, not less than twenty-five per cent thereof would be expended for work under such particular project should be construed as referring

not only to work on the site of the particular project, but also to include indirect labor resulting from the expenditures for such project.

10.

The administrative interpretation of the provisions of Title II of the National Industrial Recovery Act with reference to the preparation of a comprehensive pro-
598 gram of public works, as set forth in Finding of Fact No. 30, and the inclusion of projects therein was a reasonable, practical and proper interpretation. Moreover, that interpretation has been adopted, ratified and approved by the Congress by the subsequent statutes above referred to.

11.

The execution and performance by the defendants of the contracts with the Cities of Florence, Sheffield, Tuscumbia, Decatur, and Plainview are authorized by Title II of the National Industrial Recovery Act as continued by Section 12 of the Emergency Relief Appropriation Act of 1935, and execution and performance by the defendants of the contracts with the Cities of Hartselle, Russellville, Guntersville and Iowa City are authorized by the Emergency Relief Appropriation Act of 1935.

12.

13.

The execution and performance of these contracts are in all respects lawful under the Constitution and laws of the United States, and as to the cities other than Iowa City, under the laws and constitutions of the States in which the respective cities are situated. As to Iowa City, all questions of state law set forth in the Bill of Complaint were by stipulation withdrawn from consideration in these suits.

14.

The acts of the President and the Administrator in these cases were not unreasonable and were within the range of sound discretion.

The acts of the President and the Administrator in approving and making the contracts and the loans and grants called for the exercise of administrative discretion not subject to judicial review unless arbitrary and unreasonable.

15.

Each of the cities involved herein except Iowa City has the right under the Constitution and statutes of its State to build it proposed plant, to issue the proposed
599 bonds, and to receive the proposed grants for financing the construction of such plant.

16.

The plaintiffs have a standing as litigants in accordance with *Frost* v. *Corporation Commission*, 278 U. S. 315, which required the Court to hear their claims and decide them on the merits.

17.

The plaintiffs are not entitled to the injunctions prayed for in the bills of complaint, or any other equitable relief in these actions.

18.

The bills of complaint should be dismissed on the merits with costs, and a decree should be entered accordingly.

19.

Each city involved in these suits has a right to engage in competition with plaintiff utility company operating within that city, and to require that plaintiff to discontinue its operations in such city when its franchise has expired.

20.

The provisions of the contracts relating to wages and hours and conditions of labor in the construction of the projects are stipulated by the contracts, and cannot be changed by any of the defendants.

21.

The contracts contain no provisions constituting any delegation by any of the cities involved in these suits of their powers to the defendants or to the United States.

22.

June 26, 1936

ALFRED A. WHEAT
*Chief Justice.*

600 *Decree Dismissing Bills, etc.*

Filed June 26, 1936

* * * * * * * * *

These causes come on to be heard at this term on the merits and after the taking of testimony on behalf of all parties, were argued by counsel; and upon consideration thereof, it is this 26th day of June, 1936,

ORDERED, ADJUDGED and DECREED that the bill of complaint in each of the above causes be and it is hereby dismissed on the merits, with costs.

(s) ALFRED A. WHEAT
*Chief Justice.*

From the foregoing decree the plaintiffs in each cause give notice of appeals in open court to the United States Court of Appeals for the District of Columbia, which appeals are hereby allowed, and undertaking for costs is fixed at $100, or $50 cash in each case.

(s) ALFRED A. WHEAT
*Chief Justice.*

601 *Memoranda:*

July 10, 1936

$50.00 deposited in lieu of cost bond on appeal in Equity Cause No. 58927.

July 10, 1936

$50.00 deposited in lieu of cost bond on appeal in Equity Cause No. 59071.

July 10, 1936

$50.00 deposited in lieu of cost bond on appeal in Equity Cause No. 59671

In the District Court of the United States for the District of Columbia

Holding an Equity Court

Equity No. 58927

TEXAS UTILITIES COMPANY, *Plaintiff*,

v.

HAROLD L. ICKES, ET AL., *Defendants*.

602 *Assignment of Errors*

Filed August 14 1936.

. . . . . .

Now comes the plaintiff and assigns as errors the action of the Court in the following particulars:

1. The Court erred in dismissing the bill of complaint and in making its conclusions of law numbered 17 and 18.

2. The Court erred in making its conclusions of law nummered 1, 2 and 4, the error being that in so far as Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 were construed to authorize the acts of the defendants herein said statutes violate the Constitution of the United States in the following respects:

(a) Neither Article I, Section 8, Clauses 1 or 2, nor any other Section or Clause thereof grants to Congress the power to authorize the acts of the defendants; among other things the general welfare of the United States is not subserved thereby, but the benefits, if any, of the proposed action are purely local and not national.

(b) The Tenth Amendment denies to Congress the
603 power to authorize the acts of the defendants in that

(i) they regulate and affect matters of purely local concern in Plainview, Texas, wholly within the police power of the State of Texas, and not subject, directly or indirectly, to Federal control;

(ii) their primary purpose and necessary effect is to regulate and lower intrastate electricity rates and to promote public ownership of electricity facilities;

(iii) their purpose and effect is to effectuate control by the Federal Government over working conditions and other details of the construction and operation of an electricity project in Plainview, Texas.

(c) Both Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 delegate power beyond the limitations of Article I, Section 1; Article I, Section 8, Clauses 1, 2, and 18; Article I, Section 9, Clause 7; Article II, Section 1; and the other provisions of the Constitution contemplating a division of

power among the independent branches of the Government of the United States.

(d) Neither the said statutes nor the acts of the defendants have provided the plaintiff with an adequate hearing, and they otherwise arbitrarily provide for and seek the taking of the plaintiff's property without the due process guaranteed by the Fifth Amendment.

3. The Court erred in making its conclusion of law numbered 5, the error being that:

(a) The lowering of rates is not the incidental effect of what the States and municipalities decide to do, but is the paramount, desired and necessary effect of the defendants' actions;

604

4. The Court erred in making its conclusion of law numbered 6, the error being that the defendants, through control over allotted funds and otherwise, retain unlimited power with respect to the Plainview project, and that the defendants are exercising and will in the future exercise this control, as well as their other powers, to effectuate regulation of commerce within the State of Texas and other States, in derogation of the police power of the States.

5. The Court erred in making its conclusions of law numbered 7, 8, 9, 10, 11, 14, the error being that the action of the defendants is not authorized by Title II of the National Industrial Recovery Act or The Emergency Relief Appropriation Act of 1935 for the following reasons:

(a) The comprehensive program required by Sections 202 and 203 of the National Industrial Recovery Act has never been prepared.

(b) The loan to the City of Plainview is not reasonably secured as required by Section 203 of the National Industrial Recovery Act.

(c) The arrangement between the City of Plainview and the defendants conveys to the defendants local municipal powers and otherwise violates Article I, Section 17; Article II, Article III; and Article III, Section 53 of the Constitution of the State of Texas; of Title 28; and of Articles 2368-a, 2559-2566, 1138, and 1638 of the Texas Revised Civil Statutes; and other provisions of the law, statutes, and Constitution of the State of Texas reposing power in the City of Plainview and regulating its affairs.

605

(d) The Plainview project is not reasonably designed to increase employment quickly as required by Section 203 of the National Industrial Recovery Act and Section 1 of The Emergency Relief Appropriation Act of 1935.

(e) The Plainview project is not "useful" in the sense required by law, but is wasteful and useless.

(f) The project is designed to effectuate the reduction of and control over intrastate electricity rates at the defendants' direction and the furthering of public ownership of electricity facilities.

6. The Court erred in making the first clause of its conclusion of law numbered 13 for the reasons set forth in Assignments 2 and 5, *supra.*

7. The Court erred in making its conclusions of law numbered 13, 15, and 21 for the reasons set forth in Assignments 2 and 5, *supra,* notably in subparagraph (c) of the latter.

8. The Court erred in making its conclusion of law numbered 20 for the reason that the defendants may impose such changes.

9. The Court erred in making its conclusion of law numbered 14 for the reason among others, in addition to those set forth in Assignment 5, *supra,* that thus to limit judicial review deprives the plaintiff of the privilege of the full and complete judicial scrutiny of the facts, jurisdictional and otherwise, guaranteed it by the due process clause of the Fifth Amendment, by Article III, Sections 1 and 2 of the Constitution, and by Title 18, ch. 3, Secs. 41, 43, 44, and 47 of the Code of the District of Columbia.

10. The Court erred in making its finding of fact
606 numbered 19, the error being that there is no evidence to justify a finding that the City of Plainview is authorized to receive a grant for the purpose stated.

11. The Court erred in making its finding of fact numbered 29, the error being that the Council authorized a contract with Montgomery & Ward, Esquires, for the designing not the erection, of a plant.

12. The Court erred in making its seventh paragraph of finding of fact numbered 31, the error being that the action of the Special Board for Public Works upon applications was taken subsequent to action by the Administrator.

13. The Court erred in making its finding of fact numbered 32, the error being that in the case of electricity projects, including that for Plainview, preferential treatment was given by PWA, and through the Electric Power Board of Review private utilities were given an opportunity to escape competition by lowering their rates to a point satisfactory to Federal officials who had no legal interest in the matter; and that in the case of electricity projects, including that of Plainview, a peculiar test of social desirability was applied by PWA and the defendants, to-wit, the lowering of electricity rates and extension of public ownership. The Court erred further in the said finding in that in the case of the Plainview project there was no examination of or report upon the Plainview application by the State Engineers or other State PWA officers.

14. The Court erred in making its finding of fact numbered 33, the error being that certain of the subordinate bodies of PWA and agents of defendants were authorized to solicit applications through publicity and otherwise and to enter into negotiations with private utilities relative to electricity rates.

607

15. The Court erred in making its finding of fact numbred 35, the error being that PWA and the defendants did make the determination that competition with the plaintiff was desirable, the error further being that PWA and the defendants solicited applications for projects through widespread publicity and offers of free gifts and otherwise, that the defendants have sought injury to the plaintiff and the lowering of rates in Plainview and in other intrastate localities throughout the nation, and that the arrangement with Plainview does purchase control by defendants over matters of local concern.

16. The Court erred in making its findings of fact numbered 36, 37, and 38, the error being that they have no support in the evidence.

17. The Court erred in making its finding of fact numbered 41, the error being that the finding is in truth a conclusion of law and, further, is contrary to the evidence.

18. The Court erred in making its finding of fact numbered 42, the error being that there is no substantial evidence to support a conclusion that the project is self-liqui-

dating or the loan reasonably secured, and that the Administrator never so determined.

19. The Court erred in making its finding of fact numbered 47, the error being the same as that in the
608 case of finding numbered 41, *supra;* and being further that the purpose and necessary effect of the defendants' acts was to regulate and lower intrastate electricity rates and to further public ownership of electricity facilities by encouraging municipalities to undertake such projects, by threatening private utilities, including the plaintiff, with competition unless rates were reduced, and by other means; and being further that the relief of unemployment did not enter into the defendants' consideration, and projects were not financed for that purpose or with that effect.

20. The Court erred in making its finding of fact number 48, the error being that there is no evidence that electricity projects such as that in Plainview are particularly adapted to the relief of unemployed persons, but the evidence shows that the direct labor furnished by such projects is negligible in amount, and such as is furnished is at greatly higher cost than in the case of any other type of project financed by PWA, that the indirect labor involved is uncertain and speculative in amount, location, and character, that all labor involved will not necessarily or probably go to unemployed persons but will go to any persons whom private contractors may choose to employ, and chiefly to skilled workers in crafts wherein there is, and, at the time the bills herein were filed, there was little if any unemployment.

21. The Court erred in failing to find that the plaintiff adequately and well served the needs of Plainview and its residents under the regulation of Plainview itself,
609 and that the defendants' project will not serve new users or promote any other useful purpose but will merely duplicate present service and destroy existing facilities, adversely affecting electricity service both in Plainview and in the surrounding region of Texas.

22. The Court erred in failing to find that no comprehensive program of public works has ever been prepared, and that the defendants have merely financed individual projects from time to time without regard to any compre-

hensive program, unless it be a program to reduce electricity rates and further public ownership of electricity facilities.

23. The Court erred in failing to find that the defendants, through control over the funds wherewith projects are financed, through their power of rescission of agreements and allotments, through their inspectors, and otherwise, require the construction of projects according to plans and specifications, construction policies, standards of materials, etc., imposed and fixed by the defendants.

24. The Court erred in failing to find that neither the defendants, the President of the United States, nor anyone else, ever made any findings of facts with respect to whether public works projects, and specifically the Plainview project, came within the statutory authorization of Congress.

25. The Court erred in failing to find that funds borrowed by the United States are to be a source for the funds to be used to finance the Plainview electricity project.

26. The Court erred in failing to find that neither
610 the defendants, nor anyone else, ever afforded to the plaintiff any opportunity to be heard, to examine and cross-examine witnesses, and to present evidence bearing upon its rights, with respect to the proposed loan and grant to the City of Plainview.

27. The Court erred in failing to find the facts set forth in Assignments 13, 14, 15, 19, and 20 herein.

28. The Court erred in refusing to require the defendants to produce a memorandum from Henry Hunt, Chairman PWA Electric Power Board of Review to Harold L. Ickes, Administrator, a letter from said Administrator to the President, and a memorandum from the President to the Administrator, all subpoenaed by the plaintiff and by which plaintiff offered to prove that the conduct of the Electric Power Board of Review was in accordance with instructions of the Administrator and the President.

29. The Court erred in excluding testimony of the witness Rau by which the plaintiffs offered to prove that the Electric Power Board of Review was governed by instructions from the Administrator and the President; that when an application for a loan and grant for a municipal electric

project came before it, the Board considered first whether the project would reduce rates paid for electric energy; that if it would not, the Board would disapprove the application; that private utilities were notified that if they lowered their rates below the proposed city rates the project would be disapproved; that the city applicant was then given a further chance to reduce the proposed rates; and that applications were in many instances disapproved by
the Board if the City could not meet the private
611 utility reduced rates.

30. The Court erred in excluding testimony of the witnesses Vennard, Cary, Board, Kennedy and Byerly and documentary evidence by which plaintiffs offered to prove in specific instances the practices mentioned in Assignment 29, the final action taken in such cases by PWA, and admissions relevant thereto binding upon the defendants.

31. The Court erred in excluding telegraphic correspondence between the defendant Ickes and one F. T. Post (Plaintiff's Exhibits for identification 231 and 232) by which plaintiffs sought to show an admission by the defendant that the PWA Electric Power Board of Review engaged in such negotiations as are set forth in Assignment 29 with his knowledge and approval.

32. The Court erred in ruling that the defendants need not produce in response to a subpoena the findings, recommendations or reports of the Electric Power Board of Review, the examining divisions of PWA, or any agency whatever of PWA, except the Special Board of Public Works, upon the projects here involved.

33. The Court erred in ruling that the defendants need not produce in response to subpoena the resolutions and other proceedings of the Special Board for Public Works determining the principles to govern the allotment and expenditure of funds under Title II of the National Industrial Recovery Act.

34. The Court erred in excluding from evidence a book and certain magazine articles written by the defendant
Ickes and certain passages therefrom (Plaintiff's
612 Exhibits for identification Nos. 123, 141, 143) and certain documents and letters issued and written by PWA (Plaintiffs' Exhibits for identification Nos. 140, 217-

230, inclusive, and 254) offered as admissions by the defendants of the truth of the facts stated by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of was to regulate and control the intrastate business of the plaintiff in generating and selling electric energy and the rates charged by it, to establish yardsticks to measure charges for such energy sold in intrastate commerce, to promote public ownership of electric generating and distributing systems—all in accord with the so-called National Power Policy of the Federal Administration—; and that the defendants solicited and promoted the cooperation of political subdivisions of States in undertaking such projects, that the plaintiff and other privately owned utilities were denied a hearing with respect to such projects, and, by the control of the funds expended, that the defendants controlled the execution of such projects.

35. The Court erred in excluding from evidence certain publications of the National Power Policy Committee, addresses of the President, publications of the Tennessee Valley Authority, (Plaintiffs' Exhibits for identification Nos. 165-170, inclusive, 175-179, inclusive, 181, 183, 184), setting forth the so-called National Power Policy of the Administration referred to by the defendant Ickes, by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of were as set
613 forth in Assignment 34.

36. The Court erred in refusing to receive the testimony of the witnesses Lawrence, Field and Byerly, and the depositions of the witnesses Hiss, Harvey, Hoffman, Dysart and Rowell and documentary evidence (Plaintiffs' Exhibits for identification 21, 22, 268, 269, 270) by which plaintiff sought to prove that the offer of PWA to make a grant of from 30 to 45 per centum of the cost of construction of municipal electric projects and to lend the remainder of the cost to be repaid only out of the earnings of the proposed project had the effect of inducing certain of the municipalities here involved and municipalities generally to undertake such projects and that in elections held to vote upon such projects the proponents thereof represented said offer as a gift imposing no liability upon the recipients.

37. The Court erred in permitting the witness Ickes to testify as to action he took concerning correspondence by Mr. Hunt relating to an application of Hiram, Ohio, and in receiving in evidence Defendants' Exhibit No. 11.

38. The Court erred in permitting the witness Ickes, upon his redirect examination, to answer the following question: "Your purpose in making these contracts for those competitive projects always was to increase employment quickly as the statute required, and these other considerations were only incidental and collateral?"

39. The Court erred in excluding testimony offered by the plaintiff through the witness Veatch to show (a) the cost of labor at the site of the proposed Plainview project
614 and (b) the amount of the Plainview business which the proposed municipal plant would secure.

40. The Court erred in making its conclusion of law numbered 4 the error being, in addition to that set forth in Assignment 2, *supra*, that neither the Emergency Relief Act of 1935 nor Section 12 of The Emergency Relief Appropriation Act of 1935 reaffirmed any standards, as administratively interpreted or otherwise, set forth in Title II of the National Industrial Recovery Act, and in none of the said three statutes were there any adequate legisla[illegible]e standards whatever for the guidance of administrative action.

41. The Court erred in making its conclusion of law numbered 19, the error being that the City of Plainview may not compete with or supplant plaintiff in an illegal manner and particularly by means of a loan and grant from the United States on the terms and conditions involved in this case.

EDWARD B BURLING
*Attorney for Plaintiff.*

Received a copy of the foregoing Assignment of Errors this.....day of....., 1936.

ALEXANDER HOLTZOFF
*Attorney for Defendants.*

615 In the District Court of the United States for the District of Columbia

Signed copy.

In Equity No. 59071

ALABAMA POWER COMPANY,

v.

HAROLD L. ICKES ET AL.,

*Assignments of Error*

Filed August 14 1936

* * * * * * * * * * *

Now comes the plaintiff and assigns as errors the action of the Court in the following particulars:

1. The Court erred in dismissing the bill of complaint and in making its conclusions of law numbered 17 and 18.

2. The Court erred in making its conclusions of law numbered 1, 2 and 4, the error being that in so far as Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935 were construed to authorize the acts of the defendants herein said statutes violate the Constitution of the United States in the following respects:

(a) Neither Article 1, Section 8, Clauses 1 or 2, nor any other Section or Clause thereof grants to Congress the power to authorize the acts of the defendants; among other things the general welfare of the United States is not subserved thereby but the benefits, if any, of the proposed action are purely local and not national.

(b) The Tenth Amendment denies to Congress the power to authorize the acts of the defendants in that

(i) they regulate and affect matters of purely local
616 concern in Florence, Sheffield, Tuscumbia and Decatur, Alabama, wholly within the police power of the State of Alabama, and not subject, directly or indirectly, to federal control;

(ii) their primary purpose and necessary effect is to regulate and lower intrastate electricity rates and to promote public ownership of electricity facilities;

(iii) Their purpose and effect is to effectuate control by the Federal Government over working conditions and other details of the construction and operation of electricity proj-

ects in Florence, Sheffield, Tuscumbia and Decatur, Alabama.

(c) Both Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 delegate power beyond the limitations of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; Article I, Section 9, Clause 7; Article II, Section 1; and the other provisions of the Constitution contemplating a division of power among independent branches of the Government of the United States.

(d) Neither the said statutes nor the acts of the defendants have provided the plaintiff with an adequate hearing, and they otherwise arbitrarily provide for and seek the taking of the plaintiff's property without the due process guaranteed by the Fifth Amendment.

3. The Court erred in making its conclusion of law numbered 5, the error being that the lowering of rates is not the incidental effect of what the States and municipalities decide to do, but is the paramount, desired and necessary effect of the defendants' actions.

4. The Court erred in making its conclusions of
617 law numbered 6, the error being that the defendants, through control over allotted funds and otherwise, retain unlimited power with respect to the Florence, Sheffield, Tuscumbia and Decatur projects, and that the defendants are exercising and and will in the future exercise this control, as well as their other powers, to effectuate regulation of commerce within the State of Alabama and other States in derogation of the police power of the States.

5. The Court erred in making its conclusions of law numbered 7, 8, 9, 10, 11, 14 the error being that the action of the defendants is not authorized by Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935 for the following reasons:

(a) The comprehensive program required by sections 202 and 203 of the National Industrial Recovery Act has never been prepared.

(b) The Florence, Sheffield, Tuscumbia and Decatur projects are not reasonably designed to increase employment quickly as required by Section 203 of the National Industrial Recovery Act and Section 1 of The Emergency Relief Appropriation Act of 1935.

(c) The Florence, Sheffield, Tuscumbia and Decatur projects are not "useful" in the sense required by law but are wasteful and useless.

(d) These projects are designed to effectuate the reduction of and control over intrastate electricity rates at the defendants' direction and the furthering of public ownership of electricity facilities.

6. The Court erred in making the first clause of its conclusion of law numbered 13 for the reasons set forth in Assignments 2 and 5, *supra.*

618 7. The Court erred in making its conclusions of law numbered 13, 15, and 21 for the reasons set forth in Assignments 2 and 5, *supra.*

8. The Court erred in making its conclusion of law numbered 20 for the reason that the defendants may impose such changes.

9. The Court erred in making its conclusion of law numbered 14 for the reason, among others, in addition to those set forth in Assignment 5, *supra,* that thus to limit judicial review deprives the plaintiff of the privilege of the full and complete judicial scrutiny of the facts, jurisdictional and otherwise, guaranteed it by the due process clause of the Fifth Amendment, by Article III, Section 1 and 2 of the Constitution, and by Title 18, ch. 3, Sec. 41, 43, 44, 47 of the Code of the District of Columbia.

10. The Court erred in making its finding of fact numbered 19, the error being that there is no evidence to justify a finding that the Cities of Florence, Sheffield, Tuscumbia and Decatur are authorized to receive grants for the purpose stated.

11. The Court erred in making its seventh paragraph of finding of fact numbered 31, the error being that the action of the Special Board for Public Works upon applications was taken subsequent to action by the Administrator.

12. The Court erred in making its finding of fact numbered 32, the error being that in the case of electricity projects, including those for Florence, Sheffield, Tuscumbia, and Decatur, preferential treatment was given by PWA, and through the Electric Power Board of Review private utilities were given an opportunity to escape competition by lowering their rates to a point satisfactory to federal officials who had no legal interest in the matter;

619 and that in the case of electricity projects, including those of Florence, Sheffield, Tuscumbia and Decatur, a peculiar test of social desirability was applied by PWA and the defendants, to wit, the lowering of electricity rates and extension of public ownership.

13. The Court erred in making its finding of fact numbered 35, the error being that certain of the subordinate bodies of PWA and agents of defendants wer authorized to solicit applications through publicity and otherwise and to enter into negotiations with private utilities relative to electricity rates.

14. The Court erred in making its finding of fact numbered 35, the error being that PWA and the defendants did make the determination that competition with the plaintiff was desirable, the error further being that PWA and the defendants solicited applications for projects through widespread publicity and offers of free gifts and otherwise, that the defendants have sought injury to the plaintiff and the lowering of rates in Florence, Sheffield, Tuscumbia and Decatur, and in other intrastate localities throughout the Nation, and that the arrangements with Florence, Sheffield, Tuscumbia and Decatur do purchase control by defendants over matters of local concern.

15. The Court erred in making its findings of fact numbered 36, 37 and 38, the error being that they have no support in the evidence.

16. The Court erred in making its findings of fact numbered 41, the error being that the finding is in truth a conclusion of law, and, further, is contrary to the evidence.

17. The Court in making its finding of fact numbered 42 erred, the error being that the Administrator did
620 not determine that the loans to Florence, Sheffield, Tuscumbia and Decatur are reasonably secured.

18. The Court erred in making its finding of fact numbered 47, the error being the same as that in the case of finding numbered 41, *supra;* and being further that the purpose and necessary effect of the defendants' acts was to regulate and lower intrastate electricity rates and to further public ownership of electricity facilities by encouraging municipalities to undertake such projects, by threatening private utilities, including the plaintiff, with competition unless rates were reduced, and by other means; and

being further that the relief of unemployment did not enter into the defendants' consideration, and projects were not financed for that purpose or with that effect.

19. The Court erred in making its finding of fact numbered 48, the error being that there is no evidence that electricity projects such as the Florence, Sheffield, Tuscumbia and Decatur projects are particularly adapted to the relief of unemployed persons, but the evidence shows that the direct labor furnished by such projects is negligible in amount, and such as is furnished is at greatly higher cost than in the case of any other type of project financed by PWA, that the indirect labor involved is uncertain and speculative in amount, location, and character, that all labor involved will not necessarily or probably go to uneemployed persons but will go to any persons whom private contractors may choose to employ, and chiefly to skilled workers in crafts wherein there is, and, at the time the bills herein were filed, there was little if any unemployment.

20. The Court erred in failing to find that the plaintiff adequately serves the electricity needs of Florence Sheffield, Tuscumbia and Decatur, Alabama, and their
621 residents under the regulation of the Alabama Public Service Commission, a body created by the law of Alabama with general and exclusive power and jurisdiction to regulate and supervise electric utilities, and, that the defendants' project will not serve new users or promote any other useful purpose, but will merely duplicate present service, destroy the existing facilities and completely eliminate the plaintiff from the Cities of Florence, Sheffield, Tuscumbia and Decatur, thereby causing the unemployment of a number of employees of the plaintiff, and, further, adversely affect electricity service in the State of Alabama which the plaintiff has for some time supplied at progressively reduced rates.

21. The Court erred in failing to find that no comprehensive program of public works has ever been prepared, and that the defendants have merely financed individual projects from time to time without regard to any comprehensive program, unless it be a program to reduce electricity rates and further public ownership of electricity facilities.

22. The Court erred in failing to find that the defendants, through control over the funds wherewith projects are financed, through their power of rescission of agreements and allotments, through their inspectors, and otherwise, require the construction of projects according to plans and specifications, construction policies, standards of materials, etc., imposed and fixed by the defendants.

23. The Court erred in failing to find that neither the defendants, the President of the United States, nor anyone else, ever made any findings of facts with respect to whether public works projects, and specifically the Florence, Sheffield, Tuscumbia and Decatur projects, came within the statutory authorization of Congress.

622 24. The Court erred in failing to find that funds borrowed by the United States are to be a source for the funds to be used to finance the electricity projects of Florence, Sheffield, Tuscumbia and Decatur, Alabama.

25. The Court erred in failing to find that in making those loans and grants to Florence, Sheffield, Tuscumbia and Decatur, Alabama, for the purpose of financing the construction of these distribution systems, the defendants are cooperating with the Tennessee Valley Authority to effectuate a plan to promote public ownership of electric utilities and to control and regulate intrastate electric rates.

26. The Court erred in failing to find that neither the defendants nor anyone else ever afforded to the plaintiff any opportunity to be heard, to examine and cross-examine witnesses, and to present evidence bearing upon its rights with respect to the proposed loans and grants to the Cities of Florence, Sheffield, Tuscumbia and Decatur, Alabama.

27. The Court erred in failing to find the facts set forth in Assignments 12, 13, 14, 18 and 19 herein.

28. The Court erred in making its finding of fact 20, the error being that the City of Florence did not reject this proposal of the Tennessee Valley Authority but formally accepted this proposal of the Tennessee Valley Authority.

29. The Court erred in refusing to require the defendants to produce a memorandum from Henry Hunt, Chairman PWA Electric Power Board of Review to Harold L.

Ickes, Administrator, a letter from said Administrator to the President, and a memorandum from the President to the Administrator, all subpoenaed by the plaintiff and by which plaintiff offered to prove that the conduct of the Electric Power Board of Review was in accordance
623 with instructions of the Administrator and the President.

30. The Court erred in excluding testimony of the witness Rau by which the plaintiff offered to prove that the Electric Power Board of Review was governed by instructions from the Administrator and the President; that when an application for a loan and grant for a municipal electric project came before it, the Board considered first whether the project would reduce rates paid for electric energy; that if it would not, the Board would disapprove the application; that private utilities were notified that if they lowered their rates below the proposed city rates the project would be disapproved; that the city applicant was then given a further chance to reduce the proposed rates; and that applications were in many instances disapproved by the Board if the city could not meet the private utility reduced rates.

31. The Court erred in excluding testimony of the witnesses Vennard, Cary, Board, Kennedy and Byerly and documentary evidence by which plaintiffs offered to prove in specific instances the practices mentioned in Assignment No. 30 the final action taken in such cases by PWA, and admissions relevant thereto binding upon the defendants.

32. The Court erred in excluding telegraphic correspondence between the defendant Ickes and one F. T. Post (Plaintiffs' Exhibits for identification 231 and 232) by which plaintiff sought to show an admission by the defendant that the PWA Electric Power Board of Review engaged in such negotiations as are set forth in Assignment No. 30 with his knowledge and approval.

33. The Court erred in ruling that the defendants need not produce in response to a subpoena the findings, recommendations or reports of the Electric Board of
624 Review, the examining divisions of PWA or any agency whatever of PWA, except the Special Board of Public Works, upon the projects here involved.

34. The Court erred in ruling that the defendants need

not produce in response to subpoena the resolutions and other proceedings of the Special Board for Public Works determining the principles to govern the allotment and expenditure of funds under Title II of the National Industrial Recovery Act.

35. The Court erred in excluding from evidence a book and certain magazine articles written by the defendant Ickes and certain passages therefrom (Plaintiffs' Exhibits for identification Nos. 123, 141, 143) and certain documents and letters issued and written by PWA (Plaintiffs' Exhibits for identification Nos. 140, 217-230 inclusive, and 254) offered as admissions by the defendants of the truth of the facts stated by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of was to regulate and control the intrastate business of the plaintiff in generating and selling electric energy and the rate charged by it, to establish yardsticks to measure charges for such energy sold in intrastate commerce, to promote public ownership of electric generating and distributing systems—all in accord with the so-called National Power Policy of the Federal Administration—; and that the defendants solicited and promoted the cooperation of political subdivisions of States in undertaking such projects, that the plaintiff and other privately owned utilities were denied a hearing with respect to such projects, and, by the control of the funds expended, that the defendants controlled the execution of such projects.

36. The Court erred in excluding from evidence certain publications of the National Power Policy Committee, addresses of the President, publications of the Tennessee Valley Authority (Plaintiffs' Exhibits for identification Nos. 165-170, inclusive, 175-179, inclusive, 181, 183, 184), setting forth the so-called National Power Policy of the Administration referred to by the defendant Ickes, by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of were as set forth in Assignment Nos. 25, 35.

625

37. The Court erred in refusing to receive the testimony of the witnesses Lawrence, Field, and Byerly, and the depositions of the witnesses Hiss, Harvey, Hoffman, Dysart and Rowell and documentary evidence (Plaintiffs' Ex-

hibits for identification 21, 22, 268, 269, 270) by which plaintiffs sought to prove that the offer of PWA to make a grant of from 30 to 45 per centum of the cost of construction of municipal electric projects and to lend the remainder of the cost to be repaid only out of the earnings of the proposed project had the effect of inducing certain of the municipalities here involved and municipalities generally to undertake such projects and that in elections held to vote upon such projects the proponents thereof represented said offer as a gift imposing no liability upon the recipients.

38. The Court erred in permitting the witness Ickes to testify as to action he took concerning correspondence by Mr. Hunt relating to an application of Hiram, Ohio, and in receiving in evidence Defendants' Exhibit No. 11.

39. The Court erred in permitting the witness Ickes, upon his redirect examination, to answer the following question: "Your purpose in making these contracts for these competitive projects always was to increase employment quickly as the statute required, and these other considerations were only incidental and collateral?"

626 40. The Court erred in making its conclusion of law numbered 4, the error being, in addition to that set forth in Assignment 2, *supra,* that neither the Emergency Relief Act of 1935 nor Section 12 of the Emergency Relief Appropriation Act of 1935 reaffirmed any standards, as administratively interpreted or otherwise, set forth in Title II of the National Industrial Recovery Act, and in none of the said three statutes were there any adequate legislative standards whatever for the guidance of administrative action.

41. The Court erred in making its conclusion of law numbered 19, the error being that the Cities of Florence, Sheffield, Tuscumbia and Decatur, Alabama, may not compete with or supplant plaintiff in an illegal manner and particularly by means of a loan and grant from the United States on the terms and conditions involved in this case.

EDWARD B. BURLING,
*Attorney for Plaintiff.*

Received a copy of the foregoing Assignment of Errors this ..... day of ....., 1936.

ALEXANDER HOLTZOFF,
*Attorney for Defendants.*

In the District Court of the United States for the District of Columbia

Holding an Equity Court

Equity No. 59671

ALABAMA POWER COMPANY, *Plaintiff*,

v.

HAROLD L. ICKES, ET AL., *Defendants*.

627 *Assignments of Error* Signed copy

Filed August 14 1936

Now comes the plaintiff and assigns as errors the action of the Court in the following particulars:

1. The Court erred in dismissing the bill of complaint and in making its conclusions of law numbered 17 and 18.

2. The Court erred in making its conclusions of law numbered 1, 2, and 4, the error being that in so far as Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 were construed to authorize the acts of the defendants herein said statutes violate the Constitution of the United States in the following respects:

(a) Neither Article I, Section 8, Clauses 1 or 2, nor any other Section or Clause thereof grants to Congress the power to authorize the acts of the defendants; among other things the general welfare of the United States is not subserved thereby, but the benefits, if any, of the proposed action are purely local and not national.

628 (b) The Tenth Amendment denies to Congress the power to authorize the acts of the defendants in that

(i) they regulate and affect matters of purely local concern in Hartselle, Russellville and Guntersville, Alabama, wholly within the police power of the State of Alabama, and not subject, directly or indirectly, to Federal control;

(ii) their primary purpose and necessary effect is to regulate and lower intrastate electricity rates and to promote public ownership of electricity facilities;

(iii) their purpose and effect is to effectuate control by the Federal Government over working conditions and other details of the construction and operation of electricity projects in Hartselle, Russellville, and Guntersville, Alabama.

(c) Both Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 delegate power beyond the limitations of Article I, Section 1; Article I, Section 8, Clauses 1, 2, and 18; Article 1, Section 9, Clause 7; Article II, Section 1; and the other provisions of the Constitution contemplating a division of power among independent branches of the Government of the United States.

(d) Neither the said statutes nor the acts of the defendants have provided the plaintiff with an adequate hearing, and they otherwise arbitrarily provide for and seek the taking of the plaintiff's property without the due process guaranteed by the Fifth Amendment.

3. The Court erred in making its conclusion of law numbered 5, the error being that the lowering of rates
629 is not the incidental effect of what the States and municipalities decide to do, but is the paramount, desired and necessary effect of the defendants' actions.

4. The Court erred in making its conclusion of law numbered 6, the error being that the defendants, through control over allotted funds and otherwise, retain unlimited power with respect to the Hartselle, Russellville and Guntersville projects, and that the defendants are exercising and will in the future exercise this control, as well as their other powers, to effectuate regulation of commerce, within the State of Alabama and other States, in derogation of the police power of the States.

5. The Court erred in making its conclusions of law numbered 7, 8, 9, 10, 11, and 14, the error being that the action of the defendants is not authorized by Title II of the National Industrial Recovery Act or The Emergency Relief Appropriation Act of 1935 for the following reasons:

(a) The comprehensive program required by Sections 202 and 203 of the National Industrial Recovery Act has never been prepared.

(b) The Hartselle, Russellville and Guntersville projects are not reasonably designed to increase employment quickly as required by Section 203 of the National Industrial Recovery Act and Section 1 of The Emergency Relief Appropriation Act of 1935.

(c) The Hartselle, Russellville and Guntersville projects are not "useful", in the sense required by law, but are wasteful and useless.

(d) These projects are designed to effectuate the
630 reduction of and control over intrastate electricity rates at the defendants' direction and the furthering of public ownership of electricity facilities.

6. The Court erred in making the first clause of its conclusion of law numbered 13 for the reasons set forth in Assignments 2 and 5, *supra.*

7. The Court erred in making its conclusions of law numbered 13, 15, and 21 for the reasons set forth in Assignments 2 and 5, *supra*.

8. The Court erred in making its conclusion of law numbered 20 for the reason that the defendants may impose such changes.

9. The Court erred in making its conclusion of law numbered 14 for the reason among others, in addition to those set forth in Assignment 5, *supra*, that thus to limit judicial review deprives the plaintiff of the privilege of the full and complete judicial scrutiny of the facts, jurisdictional and otherwise, guaranteed it by the due process clause of the Fifth Amendment, by Article III, Sections 1 and 2 of the Constitution, and by Title 18, ch. 3, Sec. 41, 43, 44, and 47 of the Code of the District of Columbia.

10. The Court erred in making conclusion of law numbered 9, the error being that the term "works" as used in The Emergency Relief Appropriation Act of 1935 does not include indirect labor resulting from the expenditures for such projects, but only includes direct labor at the site of the projects.

11. The Court erred in making its finding of fact numbered 19, the error being that there is no evidence to justify a finding that the Cities of Hartselle, Russellville,
631 and Guntersville are authorized to receive grants for the purpose stated.

12. The Court erred in making its seventh paragraph of finding of fact numbered 31, the error being that the action of the Special Board for Public Works upon applications was taken subsequent to action by the Administrator.

13. The Court erred in making its finding of fact numbered 32, the error being that in the case of electricity projects, including those for Hartselle, Russellville and Guntersville, preferential treatment was given by PWA, and through the Electric Power Board of Review private utilities were given an opportunity to escape competition by lowering their rates to a point satisfactory to Federal officials who had no legal interest in the matter; and that in the case of electricity projects, including those of Hartselle, Russellville and Guntersville, a peculiar test of social desirability was applied by PWA and the defendants, to-wit,

the lowering of electricity rates and extension of public ownership.

14. The Court erred in making its finding of fact numbered 33, the error being that certain of the subordinate bodies of PWA and agents of defendants were authorized to solicit applications through publicity and otherwise and to enter into negotiations with private utilities relative to electricity rates.

15. The Court erred in making its finding of fact numbered 35, the error being that PWA and the defendants did make the determination that competition with the plaintiff was desirable, the error further being that PWA and the defendants solicited applications for proj-
632 ects through widespread publicity and offers of free gifts and otherwise, that the defendants have sought injury to the plaintiff and the lowering of rates in Hartselle, Russellville and Guntersville and in other intrastate localities throughout the nation, and that the arrangements with Hartselle, Russellville and Guntersville do purchase control by defendants over matters of local concern.

16. The Court erred in making its findings of fact numbered 36, 37, and 38, the error being that they have no support in the evidence.

17. The Court erred in making its finding of fact numbered 41, the error being that the finding is in truth a conclusion of law and, further, is contrary to the evidence.

18. The Court erred in making its finding of fact numbered 42, the error being that the Administrator did not determine that the loans to Hartselle, Russellville and Guntersville are reasonably secured.

19. The Court erred in making its finding of fact numbered 47, the error being the same as that in the case of finding numbered 41, *supra*, and being further that the purpose and necessary effect of the defendants' acts was to regulate and lower intrastate electricity rates and to further public ownership of electricity facilities by encouraging municipalities to undertake such projects, by threatening private utilities, including the plaintiff, with competition unless rates were reduced, and by other means; and being further that the relief of unemployment did not enter into the defendants' consideration, and projects were not financed for that purpose or with that effect.

20. The Court erred in making its finding of fact numbered 48, the error being that there is no evidence
633 that electricity projects such as those in Hartselle, Russellville and Guntersville are particularly adapted to the relief of unemployed persons, but the evidence shows that the direct labor furnished by such projects is negligible in amount, and such as is furnished is at greatly higher cost than in the case of any other type of project financed by PWA, that the indirect labor involved is uncertain and speculative in amount, location, and character, that all labor involved will not necessarily or probably go to unemployed persons but will go to any persons whom private contractors may choose to employ, and chiefly to skilled workers in crafts wherein there is, and, at the time the bills herein were filed, there was little if any unemployment.

21. The Court erred in failing to find that the plaintiff adequately serves the electricity needs of Hartselle, Russellville and Guntersville, Alabama, and their residents under the regulation of the Alabama Public Service Commission, a body created by the law of Alabama with general and exclusive power and jurisdiction to [illegible]ite and supervise electric utilities, and, that the [illegible]nts' project will not serve new users or promote a[illegible]er useful purpose but will merely duplicate present service, destroy the existing facilities and completely eliminate the plaintiff from the Cities of Hartselle, Russellville and Guntersville, thereby causing the unemployment of a number of employees of the plaintiff, and, further, adversely affect electricity service in the State of Alabama which the plaintiff has for some time supplied at progressively reduced rates.

22. The Court erred in failing to find that no com-
634 prehensive program of public works has ever been prepared, and that the defendants have merely financed individual projects from time to time without regard to any comprehensive program, unless it be a program to reduce electricity rates and further public ownership of electricity facilities.

23. The Court erred in failing to find that the defendants, through control over the funds wherewith projects are financed, through their power of rescission of agreements and allotments, through their inspectors, and otherwise,

required the construction of projects according to plans and specifications, construction policies, standards of materials, etc., imposed and fixed by the defendants.

24. The Court erred in failing to find that neither the defendants, the President of the United States, nor anyone else, ever made any findings of facts with respect to whether public works projects, and specifically the Hartselle, Russellville, and Guntersville projects, came within the statutory authorization of Congress.

25. The Court erred in failing to find that funds borrowed by the United States are to be a source for the funds to be used to finance the electricity projects of Hartselle, Russellville and Guntersville.

26. The Court erred in failing to find that in making these loans and grants to Hartselle, Russellville and Guntersville, Alabama, for the purpose of financing the construction of these distribution systems, the defendants are cooperating with the Tennessee Valley Authority in effectuating a plan to promote public ownership of electric utilities and to control and regulate intrastate electric rates.

635 27. The Court erred in failing to find that neither the defendants, nor anyone else, ever afforded to the plaintiff any opportunity to be heard, to examine and cross-examine witnesses, and to present evidence bearing upon its rights with respect to the proposed loans and grants to the Cities of Hartselle, Russellville and Guntersville.

28. The Court erred in failing to find the facts set forth in Assignments 13, 14, 15, 19 and 20 herein.

28a. The Court erred in making its finding of fact 15, the error being that the franchises of the plaintiff in Hartselle, Russellville and Guntersville, Alabama, are not "intermediate" franchises but are franchises of perpetual duration.

29. The Court erred in making its finding of fact 44, the error being that there is no evidence to support the finding that 25% of the defendants' loan or grant or the aggregate thereof to the Cities of Hartselle, Russellville and Guntersville, Alabama, will be expended for work in each of these projects.

30. The Court erred in refusing to require the defendants to produce a memorandum from Henry Hunt, Chairman

PWA Electric Power Board of Review to Harold L. Ickes, Administrator, a letter from said Administrator to the President, and a memorandum from the President to the Administrator, all subpoenaed by the plaintiff and by which plaintiff offered to prove that the conduct of the Electric Power Board of Review was in accordance with instructions of the Administrator and and the President.

31. The Court erred in excluding testimony of the witness Rau by which the plaintiff offered to prove that
636 the Electric Power Board of Review was governed by instructions from the Administrator and the President; that when an application for a loan and grant for a municipal electric project came before it, the Board considered first whether the project would reduce rates paid for electric energy; that if it would not, the Board would disapprove the application; that private utilities were notified that if they lowered their rates below the proposed city rates the project would be disapproved; that the city applicant was then given a further chance to reduce the proposed rates; and that applications were in many instances disapproved by the Board if the city could not meet the private utility reduced rates.

32. The Court erred in excluding testimony of the witnesses Vennard, Cary, Board, Kennedy and Byerly and documentary evidence by which plaintiffs offered to prove in specific instances the practices mentioned in Assignment 31, the final action taken in such cases by PWA, and admissions relevant thereto binding upon the defendants.

33. The Court erred in excluding telegraphic correspondence between the defendant Ickes and one F. T. Post (Plaintiffs' Exhibits 231 and 232) by which plaintiff sought to show an admission by the defendant that the PWA Electric Power Board of Review engaged in such negotiations as are set forth in Assignment 31 with his knowledge and approval.

34. The Court erred in ruling that the defendants need not produce in response to a subpoena the findings, recommendations or reports of the Electric Power Board of Review, the examining divisions of PWA or any agency whatever of PWA, except the Special Board of Public Works, upon the projects here involved.

637 35. The Court erred in ruling that the defendants need not produce in response to subpoena the resolutions and other proceedings of the Special Board for Public Works determining the principles to govern the allotment and expenditure of funds under Title II of the National Industrial Recovery Act.

36. The Court erred in excluding from evidence a book and certain magazine articles written by the defendant Ickes and certain passages therefrom (Plaintiffs' Exhibits for identification Nos. 123, 141, 143) and certain documents and letters issued and written by PWA (Plaintiffs' Exhibits for identification Nos. 140, 217-230, inclusive, and 254) offered as admissions by the defendants of the truth of the facts stated by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of was to regulate and control the intrastate business of the plaintiff in generating and selling electric energy and the rate charged by it, to establish yardsticks to measure charges for such energy sold in intrastate commerce, to promote public ownership of electric generating and distributing systems,—all in accord with the so-called National Power Policy of the Federal Administration—; and that the defendants solicited and promoted the cooperation of political subdivisions of States in undertaking such projects, that the plaintiff and other privately owned utilities were denied a hearing with respect to such projects, and, by the control of the funds expended, that the defendants controlled the execution of such projects.

37. The Court erred in excluding from evidence certain publications of the National Power Policy Committee, addresses of the President, publications of the Tennes-
638 see Valley Authority, (Plaintiffs' Exhibits for identification Nos. 165-170, inclusive, 175-179, inclusive, 181, 183, 184), setting forth the so-called National Power Policy of the Administration referred to by the defendant Ickes, by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of were as set forth in Assignments 26, 36.

38. The Court erred in refusing to receive the testimony of the witnesses Lawrence, Field and Byerly, and the depositions of the witnesses Hiss, Harvey, Hoffman, Dysart and Rowell and documentary evidence (Plaintiffs' Exhibits for

identification 21, 22, 268, 269, 270) by which plaintiff sought to prove that the offer of PWA to make a grant of from 30 to 45 per centum of the cost of construction of municipal electric projects and to lend the remainder of the cost to be repaid only out of the earnings of the proposed project had the effect of inducing certain of the municipalities here involved and municipalities generally to undertake such projects and that in elections held to vote upon such projects the proponents thereof represented said offer as a gift imposing no liability upon the recipients.

39. The Court erred in permitting the witness Ickes to testify as to action he took concerning correspondence by Mr. Hunt relating to an application of Hiram, Ohio, and in receiving in evidence Defendants' Exhibit No. 11.

40. The Court erred in permitting the witness Ickes upon his redirect examination to answer the following question: "Your purpose in making these contracts for these competitive projects always was to increase employment quickly as the statute required; and these other con-
639 siderations were only incidental and collateral?"

41. The Court erred in making its finding of fact numbered 44, the error being that the action of the President in stating that 25% of the loan or grant to each of the Cities of Hartselle, Russellville, and Guntersville, or the aggregate thereof, will be expended for work on each project was not a determination of such facts.

42. The Court erred in failing to find that the action of the President referred to in its finding of fact numbered 44 was taken with no evidence or information before him supporting such a determination, and that there will not be spent for work on each of the projects of the Cities of Hartselle, Russellville, and Guntersville 25% of the loan or grant or aggregate thereof.

43. The Court erred in making its conclusion of law numbered 4, the error being, in addition to that set forth in Assignment 2, *supra,* that neither the Emergency Relief Act of 1935 nor Section 12 of The Emergency Relief Appropriation Act of 1935 reaffirmed any standards, as administratively interpreted or otherwise, set forth in Title II of the National Industrial Recovery Act, and in none of the said three statutes were there any adequate legislative

standards whatever for the guidance of administrative action.

44. The Court erred in making its conclusion of law numbered 19, the error being that the Cities of Hartselle, Russellville, and Guntersville may not compete with or supplant plaintiff in an illegal manner and particularly by means of a loan and grant from the United States
640 on the terms and conditions involved in this case.

EDWARD B. BURLING,
*Attorney for Plaintiff.*

Received a copy of the foregoing Assignment of Errors this ..... day of ....., 1936.

ALEXANDER HOLTZOFF,
*Attorney for Defendants.*

641 District Court of the United States
for the District of Columbia.

Saturday, August 15, 1936.

The Court resumes its session pursuant to adjournment, Mr. Justice Bailey, presiding.

* * * * * * * * *

Equity Nos. 58927, 59071 and 59671

Come now the parties hereto by their respective attorneys of record; and thereupon, the plaintiffs by their attorneys present to the Court their Statement of Evidence taken at the trial of these causes, and pray that the same be signed and made of record, *nunc pro tunc,* which is hereby accordingly done.

642 *Designation of Record*

Filed July 24 1936

* * * * * * * * *

The Clerk will please prepare the record on appeal in the above entitled causes and include therein the following:

In Equity No. 58927

1. Memorandum: Order of Court of Appeals remanding cause filed in Supreme Court of District of Columbia December 30, 1933.

2. Decree setting aside decree dismissing bill of complaint filed on December 30, 1933.

3. Answer to second amended bill of complaint filed on January 9, 1936, and exhibit.

4. Amendment to second amended bill of complaint filed on April 9, 1936.

5. Amendment to answer to second amended bill of complaint filed on April 20, 1936.

643 In Equity No. 59071

6. Memorandum: Order of Court of Appeals remanding cause filed in Supreme Court of District of Columbia Dec. 30, 1935.

7. Decree setting aside decree dismissing bill of complaint filed on Dec. 30, 1935.

8. Third amended bill of complaint and exhibit filed March 2, 1936.

9. Answer to third amended bill of complaint and four exhibits filed March 24, 1936.

In Equity No. 59671

10. Memorandum: Order of Court of Appeals remanding cause filed in Supreme Court of District of Columbia Dec. 30, 1935.

11. Decree setting aside decree dismissing the bill of complaint filed on Dec. 30, 1935.

12. Second amended bill of complaint and exhibit filed on March 2, 1936.

13. Answer to second amended bill of complaint and three exhibits filed on March 24, 1936.

In Consolidated Causes

14. Memorandum: Plaintiffs' Motion to consolidate causes filed March 31, 1936.

15. Order consolidating causes for trial entered March 31, 1936.

16. Memorandum opinion filed by Chief Justice Wheat on June 5, 1936.

17. Findings of fact and conclusions of law filed
644 on June 26, 1936.

18. Final decree with notation of appeal filed June 26, 1936.

19. Memorandum: Deposit of Fifty Dollars ($50.00) for costs on appeal in lieu of bond, made by each of the plaintiffs in Equity No. 58927, Equity No. 59071, and Equity No. 59671 on July 10, 1936.

20. Assignments of error.

21. Memorandum: The filing of, and orders with reference to, statement of evidence.

22. This designation of record.

DEAN G. ACHESON
HOWARD C. WESTWOOD
*Attorneys for Plaintiffs*

Received a copy of the foregoing this 24th day of July, 1936.

ALEXANDER HOLTZOFF
*Attorney for Defendants*

645 In the District Court of the United States for the District of Columbia.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 330, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Equity No. 58927, wherein Texas Utilities, a corporation, &c. is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al, are Defendants; in Equity No. 59071, wherein Alabama Power Company, a corporation is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al, are Defendants and Equity No. 58671, wherein Alabama Power Company, a corporation is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al, are Defendants, as the same remain upon the files and of record in said Court

IN TESTIMONY WHEREOF, I hereunto subscribe my

name and affix the seal of said Court, at the City of Washington, in said District, this 18th day of August, 1936.

(Seal)

CHARLES E. STEWART,
*Clerk.*

By ELIZABETH WILSON
*Assistant Clerk.*

646 United States Court of Appeals for the District of Columbia

No. 6579
No. 6580
No. 6583

TEXAS UTILITIES COMPANY, ALABAMA POWER COMPANY, ALABAMA POWER COMPANY, *Appellants,*

v.

HAROLD L. ICKES, et al., *Appellees.*

*Designation for Printing and Binding of Records*

The Clerk will please secure the printing of the items as indicated below and will have bound in the order given below both those items designated for printing and those items which need not now be printed but of which the Clerk is furnished with printed copies.

1. The printed record in the case of Texas Utilities Company v. Ickes, et al., upon the previous appeal to this Court in No. 6579. This item is not again to be printed; appropriately printed copies are furnished the Clerk.

2. Motion of defendants to remand cause upon the previous appeal in No. 6579. This item shall be printed except for Exhibits 1, 2 and 3 attached to the said motion; instead of printing these Exhibits it is to be noted that they are the same, respectively, as Exhibits D, E, and F attached to the stipulation between Texas Utilities Company and the defendants which appears at p. 235 of the typewritten Statement of Evidence herein, the said Exhibits re-
647 spectively appearing at pp. 257, 267, and 268 of the said typewritten Statement.

3. The printed record in the case of Alabama Power Company v. Ickes, et al., upon the previous appeal to this

Court in No. 6580. This item is not again to be printed; appropriately printed copies are furnished the Clerk.

4. Motion of the defendants to remand the cause upon the previous appeal in No. 6580. This item, with its exhibits, shall be printed except for Exhibits 3, 6, 9 and 12 attached to the said motion; instead of printing these Exhibits it is to be noted that they are the same, respectively, as Exhibits C, D, A, and B attached to the defendants' answer to the third amended bill of complaint in Equity No. 59071 in the United States District Court for the District of Columbia.

5. The printed record in the case of Alabama Power Company v. Ickes, et al., upon the previous appeal to this Court in No. 6583. This item is not again to be printed; appropriately printed copies are furnished the Clerk.

6. Motion of the defendants to remand the cause upon the previous appeal in No. 6583. This item shall be printed except for Exhibits 1, 2 and 3 attached to the said motion; instead of printing these Exhibits it is to be noted that they are the same, respectively, as Exhibits A, B and C attached to the defendants' answer to the second amended bill of complaint in Equity No. 59671 in the United States District Court for the District of Columbia.

7. The opinion of this Court rendered upon granting the motions of the defendants referred to in items 2, 4 and 6 supra. This item shall be printed.

648 8. The order of this Court remanding the causes upon the aforesaid motions of the defendants. This item shall be printed.

9. The entire record in Equity Nos. 58927, 59071, and 59671 of the United States District Court for the District of Columbia, as certified to this Court on August 18, 1936. This item shall be printed except for the Exhibit attached to the answer to the second amended bill of complaint in Equity No. 58927; instead of printing the said Exhibit it is to be noted that it is the same as Exhibit F to the stipulation as described in item 2 supra.

10. The entire Statement of Evidence in Equity Nos. 58927, 59071, 59671, and 60245 of the United States District Court for the District of Columbia, as certified to this Court on August 18, 1936. This item shall be printed except for the plaintiffs' Exhibit 262, and the Defendants' Ex-

hibits 10 and 12, attached thereto; appropriately printed copies of such Exhibits are furnished the Clerk.

It is requested that item 10, shall be bound in a volume separate from the preceding items.

HOWARD C. WESTWOOD
*Attorney for Appellants*

Received a copy of the foregoing this 18th day of August, 1936. Appellees have no further designations.

ALEXANDER HOLTZOFF
*Attorney for Appellees*

649 Back page: Nos. 6579-80-83, Texas Utilities Co., Alabama Power Co., Alabama Power Co., Appellants, vs. Harold L. Ickes et al. Designation for printing record. United States Court of Appeals for the District of Columbia. Filed Aug. 18 1936. Moncure Burke, Clerk.

Endorsed on cover: District Court of the United States, District of Columbia. No. 6579, Texas Utilities, a corporation organized and existing under the laws of the State of Texas, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. No. 6580, Alabama Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. No. 6583, Alabama Power Company, a corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. United States Court of Appeals for the District of Columbia. Filed Aug. 18 1936. Moncure Burke, Clerk.

[fol. 1277] Monday, February 15th, A. D. 1937.

No. 6580

ALABAMA POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.

No. 6583

ALABAMA POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof, et al.

No. 6865

IOWA CITY LIGHT AND POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.

The argument of the above entitled causes was commenced by Messrs. Dean G. Acheson and Newton D. Baker, attorneys for appellants, and was continued by Messrs. Jerome N. Frank and John W. Scott, attorneys for appellees, and was concluded by Mr. Newton D. Baker, attorney for appellants. On motion, the appellants are allowed to file a reply brief in five days, and appellees allowed five days to reply thereto. (Mr. Justice Stephens not sitting.)

[fol. 1278] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6580

ALABAMA POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al., Appellees

No. 6583

ALABAMA POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof, et al., Appellees

No. 6865

IOWA CITY LIGHT AND POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al., Appellees

Appeals from the District Court of the United States for the District of Columbia

Edward B. Burling, Spencer Gordon, Dean G. Acheson, Walter B. Guy, Louis H. Mann and Howard C. Westwood, all of Washington, D. C., and Newton D. Baker, of Cleveland, Ohio, for Appellants.

Leslie C. Garnett, David A. Pine, Angus D. MacLean, John W. Scott, Alexander Holtzoff, James W. Morris and Jerome N. Frank, all of Washington, D. C., for Appellees.

Argued February 15, 1937. Decided May 10, 1937

Before Martin, Chief Justice; Robb, Van Orsdel, and Groner, Associate Justices.

VAN ORSDEL, Associate Justice:

These are appeals from decrees of the District Court dismissing in each case bills of complaint for injunction, after hearing on the merits, to restrain loans and grants by the Public Works Administration to aid in the construction of municipal electric light and power plants in certain cities [fol. 1279] and towns in the States of Alabama and Iowa. The cases were consolidated for hearing in the court below, and were argued as one appeal in this Court.

It appears that the Alabama Power Company, an Alabama corporation, owns and operates a generating, transmission and distribution system in the State of Alabama, and distributes electrical energy to numerous communities in that State, including the Cities of Florence, Decatur, Sheffield, and Tuscumbia, and the Towns of Hartselle, Russellville, and Guntersville, in each of which it owns and operates a local plant, in accordance with and by authority of the laws of the State of Alabama.

It also appears that the Iowa City Light & Power Company, a Delaware corporation, qualified to do business in the State of Iowa as a foreign corporation, is engaged in the generation of gas and electricity, and in the transmission, distribution and sale thereof in Iowa City, Iowa, and in the incorporated towns of Coralville and University Heights in Johnson County, Iowa. With the exception of a limited sale of electricity by the City of Sheffield, these companies are the only agencies engaged in supplying electric light and power to the cities and towns above named.

The "loan and grant" agreements, under which these municipalities are to construct independent light and power plants, provide that the United States is to aid in the construction of the projects by purchasing from the municipalities their bonds, secured by a first pledge of the revenues derived from the operation of the projects, over and above the reasonable cost of operation and maintenance thereof. The grants made in the Alabama cases are equal to 30% of the cost of the labor and materials employed upon the projects, the balance of the cost to be loaned by the Govern-

ment. In the Iowa case the grant is for 45% of the cost of the project. The "loan and grant" agreements further provided: "This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or the financing or the construction thereof."

These companies in their bills of complaint are challenging the authority of the defendants through the agency of the Public Works Administration to aid and assist, by use of the public monies of the United States, in the construction by the various municipalities named of competing municipal electric distribution systems. The Alabama Company charged a conspiracy between the Public Works Administration and the Tennessee Valley Authority to disrupt and destroy its business, and by the unlawful use of public funds of the United States to carry into effect the President's announced "National Power Policy" to make electricity "more broadly available at cheaper rates to industry, to domestic and to agricultural consumers," and to regulate the rates for interstate generation, distribution, and sale of electricity.

It is also charged that this plan of the Public Works Administration is effected by inducing political subdivisions [fol. 1280] of the States to conspire with them in the accomplishment of their illegal purposes and in the unconstitutional and illegal disbursements of public monies of the United States by joint action in carrying out as Federal Public Works projects the construction of electric generating and distributing plants and systems within such subdivisions, planned, built, and financed, under the control and direction of the Public Works Administration, and to be operated in such manner from time to time as directed by that agency. In the accomplishment of this end, it is charged that the defendants threaten private electric utilities in particular locations with the construction of projects with Federal money, unless the private utilities agree to establish rates satisfactory to the Public Works Administration.

It is then charged that if the defendants are permitted to carry out these unlawful agreements "the property right of

plaintiff to operate its property and to enjoy its franchise free from injurious competition brought about by unlawful means and to conduct its intrastate business and charge rates free from unconstitutional interference and domination by an agency or agencies of the federal government, will immediately be invaded and desroyed".

Plaintiff companies pray for injunctions to restrain the defendants from in any manner aiding in the construction or financing of electric distribution systems in the cities and towns named. The court below, upon a full hearing, dismissed the bills of the plaintiffs, and from the decrees entered this appeal was taken.

We find it unnecessary to discuss in detail the various contentions relied upon by plaintiffs to establish their right to injunctions, or to enter into any discussion of the authority of the Public Works Administrator or the constitutionality of the statutes under which he purports to act, since the right of plaintiffs to the relief sought is challenged on another ground which we think disposes of these cases.

It is urged that plaintiffs have not shown any legal or equitable right which will be infringed by the making of these loans, and consequently have no standing to maintain these actions. It is disclosed by the record, and indeed conceded, that in some instances plaintiffs are operating under franchises which have not expired, and in other cases, where the franchises have expired, they are operating by consent or acquiescence of the local authorities. It is not claimed, however, that there is any material difference in the status of these companies insofar as their standing to maintain these actions is concerned. In no case do the plaintiffs have an exclusive franchise. It seems clear, therefore, that any injury which these plaintiffs may sustain from the making of these loans will result from the competition which will arise when the municipal plants begin to operate, hence it is contended that plaintiffs are not in a position to question the source from which the municipalities may derive the funds to construct their plants, whether it be lawful or unlawful.

Defendants contend that no legal injury is threatened to plaintiffs; that the threatened loss of business will be due to lawful competition of the municipalities, and merely damnum absque injuria; that the loss sustained, if any, will be caused by competition, which is lawful, and from which plaintiffs have no legal right to relief. On the other hand, plaintiffs contend that the competition would not exist were

[fol. 1281] it not for the furnishing of the funds by the defendants; hence if the statute under which these funds are supplied is unconstitutional or if the officer furnishing the funds is not authorized to do so, then they may challenge the validity of the statute or the authority of the officer. The lower court adopted this view, with which we are not in accord.

This question has been twice ruled upon by the Circuit Courts of Appeals. In Arkansas-Missouri Power Company v. Kennett, 78 F. (2d) 911, 914, the suit was by a power company to restrain the City of Kennett, Missouri, and Secretary Ickes, as Public Works Administrator, from carrying out loan and grant agreements similar to those involved in this case. The Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn, said: "The court below was of the opinion that the power company was in no position to question the power of the federal government to loan or give money to the city of Kennett. We are in accord. The United States is not proposing to become a competitor of the power company. It will have no right, title, or interest in the plant when completed and nothing to do with operating it. The destruction of the power company's property will come about by reason of the city's operation of the plant when erected. The position of the United States is that of a lender of money, a buyer of bonds, and a giver of gifts. True, the money procured from the government will enable the city to build the plant, and, if the city builds the plant, it will no doubt operate it, and when it does operate the plant the city will take the customers of the power company, and the company's property in Kennett will become worthless or greatly impaired in value. We know of no rule of law, however, which permits one indirectly hurt, no matter how seriously, by a government expenditure, to question the power of the government to make it. In fact, the rule is to the contrary. Commonwealth of Massachusetts v. Mellon, Secretary of the Treasury et al., 262 U. S. 447; City of Allegan, Mich. v. Consumers' Power Co., 71 F. (2d) 477 (certiorari denied, 293 U. S. 586). It is true that in the cases cited the plaintiffs relied upon their status as taxpayers exclusively, while in this case the plaintiff relies, in addition, upon the injury which will be done to its property by municipal competition. That injury, however, is, so far as the government is concerned, clearly consequential and indirect, as we have pointed out."

In Greenwood County v. Duke Power Company, 81 F. (2d) 986, a case involving a similar loan and grant agreement, the Circuit Court of Appeals for the Fourth Circuit reversed a decree of the District Court which granted the power company an injunction. The Circuit Court, speaking through Judge Parker, said: "For the reasons heretofore stated, the plaintiffs are not entitled to an injunction; but, even if the statute were unconstitutional or the action of the administrator unauthorized, they would not be entitled to the injunction which they ask, for the reason that no legal right of theirs is infringed by any proposed action of the county or of the commissioner of public works. The county, in its proposed action, will not infringe any such right; for it is thoroughly settled that competition by a county or municipality violates no right of a public service corporation doing business therein which, as is the case of plaintiffs here, has no [fol. 1282] exclusive franchise. Puget Sound Com. v. Seattle, 291 U. S. 619; Madera Water-works v. Madera, 228 U. S. 454. The administrator will not infringe any such right in making the loan and grant to the county from funds of the United States; for it is equally well settled that no citizen or taxpayer has any such right in funds of the government. Frothingham v. Mellon, 262 U. S. 447. * * * As the county infringes no right of plaintiffs by entering into competition with them, and as the administrator infringes no right of theirs in making loans or grants of public funds, it would seem to follow necessarily that no such right is infringed when the administrator makes a loan and grant to the county in order that the county may engage in competition; for the addition of negative quantities can never result in a quantity that is positive."

The Supreme Court of the United States reversed the Circuit Court of Appeals in this case, 299 U. S. 259, because of "irregularities in practice", holding that the case was heard upon a record improperly made up, and remanded the cause for a retrial. The plaintiffs argue from this that the Supreme Court impliedly recognized the standing of the utility company to raise the question of the constitutionality of the statute. We think this contention is without merit. The legal interest of the utility was a question in that case, and it was fully and exhaustively treated in the opinion of the Circuit Court of Appeals. On so important a point it is not for us to speculate as to what the opinion of the Supreme Court might have been had it passed directly upon

it. Moreover, the Court clearly stated that it expressed "no opinion on the relevancy or effect of the evidence, or otherwise upon the merits".

Plaintiffs' right to be heard in a judicial tribunal resolves itself to the single question of whether or not there has been an invasion of some legal or equitable right. The mere damage that may arise from the competition of the municipalities does not amount to an abridgement or impairment of any such right, nor does the mere making of loans and grants by the Administrator of Public Works, although he may be acting beyond the warrant of law, amount to an impairment of the legal or equitable rights of the plaintiffs. New Orleans, M. & T. R. Co. v. Ellerman, 105 U. S. 166, 174.

In United States v. Dern, 63 App. D. C. 28, 68 F. (2d) 773, mandamus was sought to compel the Secretary of War to cancel certain leases of warehouses which were alleged to have been made contrary to law. Plaintiffs planted their right of action on the ground that they were engaged in direct competition with the lessee, and that by reason of the advantageous provisions of the alleged illegal lease agreements the lessee was able to underbid them in competing for business. We held that this gave plaintiffs no right to challenge the legality of the action of the Secretary of War in making the leases.

The lower court, in holding that plaintiffs were entitled to challenge the validity of the Administrator's acts and the constitutionality of these statutes, relied upon Frost v. Corporation Commission, 278 U. S. 515. We think that case does not support plaintiffs' position. In that case the plaintiff was the holder of a license to operate a cotton gin which the court held to be exclusive as against persons not similarly licensed. The State legislature attempted to grant [fol. 1283] a privilege to certain cooperative societies, which was held void because violative of the equal protection clause of the Fourteenth Amendment. It was held that plaintiff was entitled to enjoin one who attempted to operate in competition with him under a void permit issued under the unconstitutional statute. The court said that the holder of a valid license might "resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights". The vital distinction between that case and the instant suits is that the operation of power plants by these municipalities is not illegal, and plaintiff has no right to exclude them from any competition upon which they may see fit to enter.

These utilities have no exclusive franchises to furnish electricity to these municipalities. It is conceded that the municipalities may lawfully compete with the plaintiffs. Any damage which results to plaintiffs from such lawful competition is merely damnum absque injuria. The fact that, in furnishing the funds which will enable the municipalities to engage in such competition, the Administrator may have exceeded his authority, or may have acted under an unconstitutional statute, does not affect the situation. The thing which affects the plaintiffs is the competition, and that is lawful.

In our opinion, no legal or equitable right of plaintiffs has been invaded, and they are therefore without standing to challenge the validity of the Administrator's acts. This being so, there is no necessity for us to consider the other questions raised on these appeals.

The decree of the lower court dismissing the bills is affirmed.

Josiah A. Van Orsdel, Associate Justice.

GRONER, J.:

I concur in the conclusion reached on the basis of the trial court's findings of fact, by which I feel bound, namely:

That the municipalities concerned acted in the matters in question of their own free will and without coercion or solicitation by the United States or the Administrator;

Second, that there is no agreement or conspiracy between the United States and the municipalities to have the United States foster municipal ownership;

Third, that the United States has, in making the loan and grant, reserved no right to control municipal power rates, to suppress competition, or to regulate operation.

If these findings reflect the real position of the United States in the matters in issue here, then I agree that the United States is only a "buyer of bonds, and a giver of gifts", and that in the circumstances the threatened damage to plaintiffs' properties is consequential and indirect.

[fol. 1284] Monday, May 10th, A. D. 1937.

April Term, 1937

No. 6580

Alabama Power Company, a Corporation, Appellant,

vs.

Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.

Appeal from the Supreme Court of the District of Columbia, Now District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court, now District Court, in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Van Orsdel.

May 10, 1937.

Concurring opinion by Mr. Justice Groner.

Mr. Justice Stephens took no part in the consideration or decision of this case.

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[fol. 1285] Monday, May 10th, A. D. 1937.

April Term, 1937

No. 6583

Alabama Power Company, a Corporation, Appellant,

vs.

Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.

Appeal from the Supreme Court of the District of Columbia, Now District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court, now District Court, in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Van Orsdel.

May 10, 1937.

Concurring opinion by Mr. Justice Groner.

Mr. Justice Stephens took no part in the consideration or decision of this case.

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[fol. 1286] Monday, May 10th, A. D. 1937.

APRIL TERM, 1937

No. 6865

IOWA CITY LIGHT AND POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.

Appeal from the District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Van Orsdel.

May 10, 1937.

Concurring opinion by Mr. Justice Groner.

Mr. Justice Stephens took no part in the consideration or decision of this case.

[fol. 1287] Monday, May 17th, A. D. 1937.

No. 6580

ALABAMA POWER CO., Appellant,

vs.

HAROLD L. ICKES et al.

No. 6583

ALABAMA POWER CO., Appellant,

vs.

HAROLD L. ICKES et al.

No. 6865

IOWA CITY LIGHT AND POWER CO., Appellant,

vs.

HAROLD L. ICKES et al.

On consideration of the appellants' motion for a stay of the mandate herein, pending application for certiorari to the Supreme Court of the United States under Rule 24, It is ordered by the Court that the motion be, and it is hereby denied; and it is further ordered that should the petition for certiorari be filed with the Supreme Court within the fifteen-day period allowed that the mandate will be automatically stayed pending action of the Supreme Court thereon.

[fol. 1288] [Stamp:] United States Court of Appeals for the District of Columbia. Filed May 19, 1937. Moncure Burke, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6580

ALABAMA POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al., Appellees

No. 6583

ALABAMA POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof, et al., Appellees

No. 6865

IOWA CITY LIGHT AND POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al., Appellees

DESIGNATION OF RECORD

The Clerk will please prepare for Appellants the following items, to be filed by them with their petitions to the Supreme Court of the United States for writs of certiorari to review the decision of this Court in the above entitled causes:

[fol. 1289] 1. The Transcript of Record in the cases of Alabama Power Company v. Ickes, Nos. 6580 and 6583, filed August 18, 1936, printed August 26, 1936. This item

is not again to be printed; appropriately printed copies are furnished the Clerk. This will be numbered Vol. I.

2. The Transcript of Record in the case of Iowa City Light and Power Company v. Ickes, No. 6865, filed October 20, 1936, printed December 3, 1936. This item is not again to be printed; appropriately printed copies are furnished the Clerk: This will be numbered Vol. 1A.

3. The Statement of Evidence in the cases of Alabama Power Company v. Ickes, Nos. 6580 and 6583, and the case of Iowa City Light and Power Company v. Ickes, No. 6865, filed August 18, 1936, printed on August 29, 1936. This item is not again to be printed; appropriately printed copies are furnished the Clerk. This will be numbered Vol. II. Plaintiffs' Exhibit 262, and Defendants' Exhibits 10 and 12 are printed under separate covers. It is suggested that the hereinafter listed items be bound at the end of the large volume containing the Statement of Evidence.

4. The Minute Entry of the argument in the Court of Appeals in the three above entitled causes on February 15, 1937.

5. The Opinion of the Court of Appeals in the three above entitled causes, rendered May 10, 1937.

6. The Decree of the Court of Appeals in the three above entitled causes.

7. The order of the Court of Appeals denying the Appellants' motion for stay of mandate as provided by Rule 24.

[fol. 1290] 8. This designation.

9. Clerk's certificate.

Dean Acheson, Attorney for Appellants.

Received a copy of the foregoing this 19th day of May, 1937.

John W. Scott, Attorney for Appellees.

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[fol. 1291] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Moncure Burke, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 1290, inclusive, are a true copy of the transcripts of record and proceedings of said Court of Appeals as designated by counsel for Appellants in the cases of Alabama

Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.; Alabama Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof, et al.; Iowa City Light and Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al., excepting Plaintiffs' Exhibit 262 and Defendants' Exhibits 10 and 12, which are bound together and certified separately, Nos. 6580, 6583, 6865, April Term, 1937, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 20th day of May, A. D. 1937.

Moncure Burke, Clerk of the United States Court of Appeals for the District of Columbia. (Seal United States Court of Appeals for the District of Columbia.)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 84

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 85

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 86

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COPY.

# Vol. IA

## TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1937

## No. 84

ALABAMA POWER COMPANY, PETITIONER,

*vs.*

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

## No. 85

ALABAMA POWER COMPANY, PETITIONER,

*vs.*

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

## No. 86

IOWA CITY LIGHT AND POWER COMPANY, PETITIONER,

*vs.*

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 26, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

Vol. I A

# TRANSCRIPT OF RECORD

## United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1936.

## No. 6865

SPECIAL CALENDAR

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IOWA CITY LIGHT AND POWER COMPANY, A CORPORATION, APPELLANT,

*vs.*

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; ET AL.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

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FILED OCTOBER 26, 1936

PRINTED DECEMBER 3, 1936